(1)

No. 91-5843-CSY Title: Dennis Sochor, Petitioner
Status: GRANTED v.
CAPITAL CASE Florida

Docketed: Court: Supreme Court of Florida
September 16, 1991

Counsel for petitioner: Jorandby,Richard

Counsel for respondent: Fowler,Joan

Entry	Date	Note	Proceedings and Orders
1	Sep 16 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Oct 15 1991		Brief of respondent Florida in opposition filed.
4	Oct 24 1991		DISTRIBUTED. November 8, 1991
6	Nov 12 1991		REDISTRIBUTED. November 15, 1991
8	Nov 18 1991		Petition GRANTED. limited to Questions 2 and 4 presented by the petition.
			**********
10	Dec 26 1991		Joint appendix filed.
		*	Joint Appendix in 2 Volumes
11	Dec 31 1991		Brief amicus curiae of Office of Capital Collateral Representative of Florida filed.
9	Jan 2 1992		SET FOR ARGUMENT MONDAY, MARCH 2, 1992. (3RD CASE)
12	Jan 2 1992		Brief amicus curiae of Volunteer Lawyers Resource Center of Florida filed.
13	Jan 10 1992		Brief of petitioner Dennis Sochor filed.
14	Jan 24 1992		CIRCULATED.
15	Jan 24 1992		Record filed.
		*	Original proceedings Supreme Court of Florida and Circuit Court. (1 Box)
16	Feb 3 1992	X	Brief of respondent Florida filed.
18	Feb 19 1992	X	Reply brief of petitioner Dennis Sochor filed.
19	Mar 2 1992		ARGUED.

EDITOR'S NOTE

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91-5843

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Case No.:

DENNIS SOCHOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Did the Florida trial and appellate courts violate the Eighth and Fourteenth Amendments by giving no weight to the mitigating evidence in imposing and reviewing petitioner's death sentence?

2. Did the Florida Supreme Court's review of petitioner's death sentence violate the Eighth and Fourteenth Amendments where that court upheld the sentence even though the trial court had instructed the jury on, and had applied, an improper aggravating circumstance, where the Florida Supreme Court did not reweigh the evidence or conduct a harmless error analysis as to the effect of improper use of the circumstance on the jury's penalty verdict?

3. In a capital case, does an instruction on an uncharged theory of guilt violate the Fifth, Sixth, Eighth, or Fourteenth Amendments?

4. Did the application of Florida's "especially heinous, atrocious or cruel" aggravating circumstance at bar violate the Eighth and Fourteenth Amendments?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Case No.:

DENNIS SOCHOR, PETITIONER,

vs.

STATE OF FLORIDA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

Petitioner, Dennis Sochor, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida, which affirmed his convictions and sentences for first degree murder and kidnapping.

CITATION TO OPINION BELOW

The decision of the Supreme Court of Florida in this cause appears as Sochor v. State, 580 So.2d 595 (Fla.1991), and is set out at Exhibit A of the appendix to this petition.[1]

---

[1] References to the record on direct appeal will appear as R __.

JURISDICTION

The Florida Supreme Court entered its opinion on May 2, 1991, and denied Mr. Sochor's timely motion for rehearing on June 18, 1991. 580 So.2d 595; App. A. The jurisdiction of this Court is invoked under 28 U.S.C. 1257, Mr. Sochor having asserted in the state court below and asserting in this Court that the State of Florida has deprived him of rights secured by the Constitution of the United States.

PROVISIONS OF LAW

The Fifth Amendment provides in pertinent part:

> ...nor shall [any person]...be deprived of life, liberty, or property, without due process of law....

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation....

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section One of the Fourteenth Amendment provides in pertinent part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

Section 921.141, Florida Statutes, which governs capital sentencing proceedings in Florida, is set out in the appendix. In simple terms, the statute creates a three stage procedure. Subsection 2 provides that, after the defendant has been found

guilty, the jury is to render a penalty verdict after determining whether "sufficient aggravating circumstances exist" (subsection 5 sets out the aggravating circumstances) and whether "sufficient mitigating circumstances exist which outweigh the aggravating circumstances" (subsection 6 sets out statutory mitigating circumstances). Subsection 3 provides that "[n]otwith-standing the recommendation of a majority of the jury," the trial court is to engage in its own weighing of aggravating and mitigating circumstances and enter written findings of fact supporting the sentencing decision. Nevertheless, the trial judge may not override a life verdict unless the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Subsection 4 provides for automatic appellate review by the state supreme court.

The appendix also contains section 787.01, Florida Statutes (kidnapping) and section 782.04(1), Florida Statutes (first degree murder).

STATEMENT OF THE CASE

Dennis Sochor was indicted by a state grand jury in Broward County, Florida for the offenses of first degree murder and kidnapping. The case was tried to a jury, which found him guilty of both offenses. At a subsequent hearing, the jury recommended that Mr. Sochor be sentenced to death for the first degree murder. The trial court judge followed that recommendation and also sentenced Mr. Sochor to life imprisonment for the kidnapping. On

appeal, the Florida Supreme Court affirmed the convictions and sentences.

A. The evidence at trial showed that, on the evening of December 31, 1981, Patricia Gifford and a friend went to a bar in Broward County, Florida to celebrate New Year's Eve. At the bar, she conversed with Dennis Sochor, who had gone to the bar with his brother, Gary. Ms. Gifford's companion fell ill, and the Sochor brothers helped Ms. Gifford take her to her car. Then, at Gary's suggestion, Ms. Gifford decided to join the men in getting something to eat, and the three set off in a truck driven by Mr. Sochor. Before getting into the truck, Ms. Gifford and Dennis were kissing in the parking lot. The accounts of what happened next are somewhat confused. Gary Sochor, the state's main witness at trial, and the only eyewitness to the offense, testified to the following regarding the trip in the truck:

> Q Did there come a time when the vehicle stopped?
>
> A I remember the vehicle coming to a stop, and Denny got out of the truck and ---
>
> Q Now, do you remember a time when Patty said something to you?
>
> A Patty was hollaring [sic] for help, asking what was going on.
>
> Q Who was she yelling to help her?
>
> A Myself. I got out of the passenger's side, ran around the vehicle, and Denny had her on the ground, had her hands pinned down. I hollared [sic] at him, and ---
>
> Q What was she doing at that time, Patty?
>
> A Just laying [sic] there, and I couldn't understand what was happening, and I just hollared [sic] at Denny to leave her alone.

I went and picked up a stone, looking for a rock or stone or something, and I remember throwing -- not to hit him. I threw the stone just above his head to scare him, and he turned and looked at me and told me to get back in the truck, which I did.

Q And why did you get back in the truck?

A Well, in our past, Denny would -- we would get in brotherly arguments and fights, and sometimes Denny would get real furious and --

Q Let me ask you this: How did he look when you saw him out there? Describe him, if you would, to the ladies and gentlemen of the jury.

A I wouldn't know what came over him at times, but a couple of times in our past and at that particular time ---

Q Do you need a drink of water, Gary?

A Some air.

MR. HANCOCK: Can we get a drink of water for him?

Q (By Mr. Hancock) Just relax.

A The pupil would roll back, and all I'd see is white in his eyes, and he'd be very -- real furious, and in a voice that wasn't his. It would be deep, and would scare you.

Q And can you describe this look?

A He looked to be possessed.

Q What do you mean by "he looked to be possessed?"

A Well, I don't know. It wasn't him. He was possessed by something, you know. I always looked at it as the devil.

Q Now, you indicated you had seen this look before; correct?

A Yes.

Q Now, after that, you indicated you got back in the truck; correct?

A Yes.

Q And after getting back in the truck, can you tell the ladies and gentlemen of the jury what you did?

A I put my face in my hands, in my lap, and just sat there.

Q And how long was it before Dennis came back into the truck?

A It seemed to be around five minutes, a couple of minutes, not very long.

Q Did you ever see Patty again?

A No.

Q And what happened after he got back in the truck?

A As we started down the road -- and it's not hard to remember, but it's just I can remember him starting to talk to me, and I started screaming because I didn't want to hear anything he had to say. I didn't look at him. I didn't sit up. I was just screaming.

Q And why didn't you make any effort to help Patty?

A I was scared of him. We got in some fights in our past, and I usually ended up on the short end of the deal.

Q And after you got back in, did he say anything to you about telling anyone?

A All I remember is the screaming, just screaming, not saying anything, just screaming, and all I remember him saying was that if I didn't shut up, I'd never see my family again.

Q When he gave that threat to you, what did you say or do?

A The next thing I remember, I stopped screaming, and I sat straight up in the truck, and I seen the stoplight, and it was like I didn't remember a thing. I mean I asked him to take me to the beach.

> Q And did there come a time when he went back to his place?
>
> A All I remember now is arguing with him about taking me to the beach.
>
> Q Did you get back to the apartment, to where he was living?
>
> A Yeah, he wouldn't take me to the beach, and we got back to the apartment, and I remember getting out and still arguing about I wanted to go down to the beach, and I can remember somebody at the other apartment hollaring [sic] at us to quiet down.

R 316-20.

Dennis Sochor gave several taped statements to police officers after his arrest in May 1986, which were summarized by the Florida Supreme Court in its opinion as follows:

> ... Sochor said that he met the victim that night at the bar and spent the evening talking with her. He remembered kissing her in the lounge parking lot and wanting to have sex. When she refused, they argued and he grabbed her. When she hit him, he became angry and choked her. He thought he had raped "another girl." He also stated that he found several woman's articles in the truck which he put in the trash. When he saw his picture on television, he took his employer's truck and drove to Tampa. From there he went to New Orleans where he stayed for some time before moving to Atlanta where he was arrested.

580 So.2d at 599 (footnote omitted).

In addition, several psychologists and psychiatrists testified regarding Mr. Sochor's mental state at the time of the offense, basing their testimony on examinations occurring after his arrest in 1986. It appears that none of these witnesses knew much about the circumstances of the incident or of Gary Sochor's statement

that Dennis was berserk at the time of the offense.[2] Based on their limited knowledge, they testified that Mr. Sochor was legally sane at the time of the offense, did not meet the criteria for involuntary hospitalization of mentally incompetent persons under Florida's "Baker Act" (sections 394.451 through 394.4789, Florida Statutes), but was an alcoholic and had abused drugs, and had mental problems.

B. At the sentencing phase, the state presented to the jury testimony regarding previous violent sexual batteries committed by Mr. Sochor in Florida and in Michigan, and testimony from his former wife regarding violent sexual acts that he had committed against her. The former wife also testified that Mr. Sochor had stolen purses from prostitutes while stationed in Italy as a paratrooper. Mr. Sochor presented evidence from family members detailing extensive and brutal physical abuse by his father during his childhood, showing that Mr. Sochor had been placed in a mental hospital in the past, that he could go berserk under the influence of alcohol, and that his mother abused him as a child.

C. In his sentencing order, the trial court judge wrote regarding the statutory mental health mitigating circumstance of extreme mental or emotional disturbance:[3]

> This mitigating circumstance does not apply. The doctors who testified all found the Defendant competent and that he did not meet the criteria for involuntary hospitalization pursuant to the Baker Act. However, he was diagnosed as extremely dangerous and violent.

---

[2] R 662-63 (testimony of Dr. Zager); R 721 (testimony of Dr. Ceros-Livingston).

[3] § 921.141(6)(b), Fla.Stat.

> Even though the Defendant claimed to the doctors he could not remember what happened, the Court finds as Dr. Castillo testified that the Defendant suffered from "selective amnesia" and attempted to mislead the doctors as to his recollections of the murderous incident.

R 1234. The judge wrote concerning the statutory mitigating circumstance of extreme duress:[4] "This mitigating circumstance does not apply." Id. Regarding the statutory mitigating circumstance of substantial impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law,[5] he wrote:

> This mitigating circumstance does not apply. All the credible evidence indicates that the Defendant was able to appreciate the criminality of his conduct and was able to conform his conduct to the requirements of law if he so desired. He told a witness who testified during the trial, that he had choked someone in Fort Lauderdale, Florida and it was so easy that he could do it again. Even though the Defendant maintained he was intoxicated during the crime, the testimony from all the witnesses showed, though he may have had some alcoholic drinks, he was still in control of his actions and behavior and knew what was happening. His ex wife testified that he acted violently even when he was not under the influence of alcohol.

R 1234-35. He wrote the following regarding nonstatutory mitigation circumstances:

> There were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory "mitigating" circumstances.

R 1235.

---

[4] § 921.141(6)(e), Fla.Stat.

[5] § 921.141(6)(f), Fla.Stat.

In affirming the death sentence, the Florida Supreme Court wrote:

> Sochor argues that the court should have found as mitigating factors that he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. In proof he relies on evidence of his alcohol use the night in question and on doctors' testimony that he was a dangerous and violent person when drinking. Sochor is an admitted rapist. As testified to by his ex-wife and the victim of a prior rape, when they declined to accede to Sochor's requests for sex he became violent. He himself explains that, when sexually aroused, an indescribable feeling comes over him in the form of an irresistible impulse particularly when drinking. It is difficult to discern whether such conduct is mitigating, but the decision as to whether a particular mitigating circumstance is proven lies with the judge and jury. Reversal is not warranted simply because the appellant arrives at a different conclusion. Stano v. State, 560 So.2d 890 (Fla.1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). Although several doctors testified as to Sochor's mental instability, one testified that Sochor had not been truthful during testing and another testified that Sochor had "selective amnesia." While the sentencing order mentioned that Sochor had been found competent to stand trial and did not require Baker Act hospitalization, it is clear from the record that this is not the standard the court used in sentencing Sochor. We see no reason to disturb the court's rejection of these mitigating factors.
>
> Sochor also argues that the trial court failed to consider and improperly excluded nonstatutory mitigating evidence. The court in its sentencing order stated "[t]here were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory 'mitigating' circumstances." This testimony related Sochor's physical abuse by his father, his financial support of the family when his father was

> unable to work, his alcohol problems, and his violent temper and mental instability. The trial judge considered the evidence of family and personal history, but determined it was so insignificant that it had not been established as a mitigating circumstance. Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion. King v. Dugger, 555 So.2d 355 (Fla.1990); Scull v. State, 533 So.2d 1137 (Fla.1988), cert. denied, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989). We find no abuse of discretion in finding that the evidence did not rise to being a mitigating circumstance.

580 So.2d at 603-604.

D. At sentencing, the prosecutor argued to the jury that the murder of Ms. Gifford was cold, calculated, and premeditated,[6] and the trial court instructed the jury on that aggravating circumstance. In the sentencing order, the trial court, in imposing the death penalty, found that the facts of the case supported the aggravating circumstance. On appeal, the Florida Supreme Court struck the circumstance:

> We disagree, however, that the murder was committed in a cold, calculated, and premeditated manner. Although there was sufficient evidence to support a premeditated murder conviction, this aggravator requires a "heightened" level of premeditation. Hamblen v. State, 527 So.2d 800 (Fla.1988). The evidence introduced at trial failed to demonstrate this requisite heightened level of premeditation. Rather, the killing most likely resulted from the victim's refusal to have consensual sex with Sochor and her resistance when he attempted to force himself upon her.

580 So.2d at 603. Nevertheless, the court upheld the death sentence, writing at page 604:

> The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing.

E. The prosecutor also argued to the jury at sentencing that the murder was "especially heinous, atrocious, or cruel,"[7] and the trial court used the circumstance in sentencing Mr. Sochor to death:

> The Court finds, according to Florida Statutes 921.141(5)(h), that the capital felony was especially heinous, atrocious or cruel. The evidence indicated that the victim was forcibly removed from the truck while she pleaded for help and even begged for her life. Even though Patricia Gifford's body was never recovered and no one knows how badly she was beaten, the Defendant admitted in his statements that as he choked her she resisted and fought him. There were several fingernail marks on his face which substantiates that violent struggle ensued as confirmed by the Defendant's statements to the police officers. Dr. Wright testified that asphyxiation is a slow and painful death. Fear and emotional trauma preceding the victim's death may be considered as contributing to the heinous nature of the capital felony. It is clear

---

[6] Under section 921.141(5)(i), Florida Statutes, the jury and judge in a capital sentencing proceeding may consider in aggravation that the murder "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." The Florida Supreme Court has limited application of the circumstance in various ways, ruling that the circumstance normally applies to "execution and contract-style killings," Garron v. State, 528 So.2d 353, 361 (Fla. 1988), and that it requires proof of "a careful plan or prearranged design" evincing "heightened premeditation." Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988) (defining "calculated"). Florida's jury instructions do not inform the sentencing jury of these limiting constructions.

[7] § 921.141(5)(h), Fla.Stat.

there was fear and definitely emotional trauma before her death.

R 1232-33.[8] Affirming, the supreme court wrote:

> The evidence also supports finding that the murder was especially heinous, atrocious, or cruel. Fear and emotional strain can contribute to the heinousness of the murder. Adams, 412 So.2d at 857. Gary testified that the victim screamed for help after she was dragged from the truck and scratches on Sochor's face indicate that a struggle took place. The evidence supports the conclusion of horror and contemplation of serious injury or death by the victim. Moreover, Sochor confessed that he choked the victim to death. It can be inferred that "strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." Tompkins v. State, 502 So.2d 415, 421 (Fla.1986) (citations omitted), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.#d.2d 781 (1987). Accord Johnson v. State, 465 So.2d 499 (Fla.), cert. denied, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); Doyle v. State, 460 So.2d 353 (Fla.1984). The trial court properly found this aggravating factor.

580 So.2d at 603.

F. Mr. Sochor raised in the Florida Supreme Court the issues now raised in this petition. The first issue (failure to weigh mitigating evidence) was raised at pages 113-122 and 128-29 of his initial brief in that court. (Mr. Sochor's initial brief and motion for rehearing are contained in the apendix to this petition.) The second issue (improper use of the "cold, calculated, and premeditated" aggravating circumstance) was raised

[8] Actually, the evidence did not show that Ms. Gifford "was forcibly removed from the truck while she pleaded for help and even begged for her life." For whatever reason, the prosecutor did not ask Gary, and the investigating officers did not ask Dennis, under what circumstances Ms. Gifford got out of the truck.

at pages 107-113 of his initial brief. He raised the third issue (instruction on uncharged theories of guilt) at pages 62-65 and 76-77 of his initial brief. The fourth issue (pertaining to the "especially heinous, atrocious, or cruel" aggravating circumstance) was raised at pages 96, 104-107, and 127-28 of his initial brief.

REASONS FOR GRANTING THE WRIT

1. Failure to consider mitigation.

This case highlights the failure of Florida courts to treat mitigating evidence in a rational and constitutional manner. The evidence regarding Mr. Sochor's childhood traumas, his alcoholism, and his drug abuse problems was substantial, competent, and unrebutted. The evidence that Mr. Sochor is a mentally disordered sex offender was overwhelming. The state's main witness at trial, Gary Sochor, testified that Dennis was berserk at the time of the offense. Yet the state courts declined to give this substantial mitigating evidence any weight in sentencing him to death.

A. Although the Eighth Amendment requires that in capital cases the sentencer must consider all relevant mitigating evidence, Skipper v. South Carolina, 476 U.S. 1 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion), Florida courts have a history of failing to consider such evidence in reaching capital sentencing decisions. See Hitchcock v. Dugger, 481 U.S. 1821 (1987) and Parker v. Dugger, 111 S.Ct. 731 (1991). Section 921.141 itself contains a list of so-called statutory mitigating circumstances, and the Florida courts originally forbade consideration of any "non-statutory" mitigation. Hitchcock Thereafter, Florida courts developed the concept of non-statutory "circumstances," but have tended to treat these non-statutory circumstances differently from the statutory circumstances. For instance, the Florida Supreme Court upheld a death sentence in Bruno v. State, 574 So.2d 76 (Fla. 1991) where it found that there were no statutory mitigating circumstances, but

gave no consideration on appeal to non-statutory mitigation: "In light of three statutory aggravating circumstances and no statutory mitigating circumstances, we find no error in the judge's sentence of death." Id. 83. Especially confused has been the consideration of non-statutory mental mitigating circumstances. Although trial court sentencing orders usually discuss the statutory circumstances of extreme disturbance and substantial impairment, they routinely ignore such non-statutory circumstances as psychological stress, developmental or educational disabilities, less than extreme disturbance, and less than substantial impairment. E.g. Hegwood v. State, 575 So.2d 170 (Fla. 1990) (trial court did not consider evidence that defendant emotionally and mentally handicapped), Cheshire v. State, 568 So.2d 908 (Fla. 1990) (error for judge to limit consideration of mental disturbance to "extreme" mental disturbance: "Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say."), and McKinney v. State, 579 So.2d 80 (Fla. 1991) (trial court did not consider non-statutory mental circumstances). Also, trial courts make the mistake of equating the statutory mental mitigating circumstances with the standard for legal insanity or for incompetency to stand trial. E.g. Mines v. State, 390 So.2d 332, 336-37 (Fla. 1980).

The Florida Supreme Court has undertaken sometimes inconsistent attempts to regularize consideration of mitigating evidence. Although section 921.141 calls for written factual findings as to mitigating evidence, and the Court has indicated that they are necessary to prevent arbitrary application of the

death penalty, Proffitt v. Florida, 428 U.S. 242, 250-51 (1976) (plurality opinion) ("Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible..."), the Florida Supreme Court long held that such findings were not necessary. In, e.g., Mason v. State, 438 So.2d 374, 380 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984), the court wrote: "The trial judge need not have expressly addressed each non-statutory mitigating factor in rejecting the same, and we will not disturb his judgment simply because appellant disagrees with the conclusions reached."

Subsequently, the court realized that the lack of specific factual findings made appellate review virtually impossible, and resulted in uneven application of the death penalty:

> There appears to be some confusion over the concept of mitigation as set forth in our death penalty statute, which requires "specific written findings of fact based upon [aggravating and mitigating] circumstances ...and upon the records of the trial and the sentencing proceedings." § 921.141(3), Fla.Stat. (1985). However, a "finding" that no mitigating factors exist has been construed in several different ways: (1) that the evidence urged in mitigation was not factually supported by the record; (2) that the facts, even if established in the record, had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved.
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> However, any consideration of mitigation must fall within certain established guidelines. In the context of the death penalty, the concept of mitigation requires that the court
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> > not be precluded from considering, as a mitigating factor, any aspect of a

> > defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.... Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due to the uniqueness of the individual is far more important than in noncapital cases.

Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2958, 2964-65, 57 L.Ed.2d 973 (1978) (emphasis in original, footnote omitted). Moreover,

> > [j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence .... The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 114-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982) (emphasis in original, footnote omitted). See also Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

Mindful of these admonitions, we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of

sufficient weight to counterbalance the aggravating factors.

Rogers v. State, 511 So.2d 526, 534 (Fla. 1987) cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). And in Campbell v. State, 571 So.2d 415 (Fla. 1990), the court held that the sentencing order must contain specific factual findings as to mitigation. In Lucas v. State, 568 So.2d 18, 24 (1990), the court, citing a 1982 case, wrote that such findings must be of "unmistakable clarity," and, citing a 1979 case, said that the written findings are necessary to full appellate review. (The court made no mention of the cases, such as Mason, holding that such findings are unnecessary.) But despite these holdings, the court has continued to uphold death sentences where the sentencing order does not address mitigating evidence.

In Floyd v. State, 569 So.2d 1225, 1233 (Fla. 1990), decided three months after Campbell and one week before Lucas, the court upheld a death sentence containing no factual findings as to non-statutory mitigation. In Valle v. State, 581 So.2d 40, 49 (Fla. 1991), the court approved a sentencing order that made no mention of mitigating evidence regarding the defendant's mental state at the time of the crime, writing: "The mere fact that the judge made no further reference to Valle's mental state at the time of the offense does not mean the court gave it no consideration." Similarly, in Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990), decided less than a month after Lucas, the court upheld imposition of the death penalty where the trial court expressly rejected the extreme disturbance circumstance but did not mention non-statutory mental mitigation. In Downs v. State, 572 So.2d 895, 901 (Fla.

1990) the court acknowledged that the defendant presented "substantial valid nonstatutory mitigating evidence," but upheld the judge's sentencing order that did not specifically consider the mitigating circumstances presented. See also Cook v. State, 581 So.2d 141, 144 (Fla. 1991) (failure to consider nonstatutory evidence in sentencing order harmless).

Thus, although specific findings are required under the statute and Constitution, and are necessary for meaningful review, the court has conducted (apparently meaningless) appellate review and upheld sentencing orders that do not make specific findings.

Also confused have been Florida court pronouncements regarding the proof of mitigating factors.[9] The court has sometimes held that it is not error to refuse to consider unrebutted mitigation, and has at other times held that it is error. In Pope v. State, 441 So.2d 1073 (Fla. 1983), the court approved the trial court's rejection of unrebutted evidence that the defendant suffered from post-traumatic stress syndrome as a result of service in Viet Nam; and in Rutherford v. State, 545 So.2d 853 (Fla. 1989) the trial court paid no heed to apparently uncontradicted evidence concerning the defendant's background and nonviolent nature, and his service as a Marine infrantyman in Viet Nam. On the other hand, the court wrote in Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988) that the sentencer must consider evidence of alcohol or drug abuse "especially where established by uncontroverted factual evidence

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[9] Similarly, the court has gone back and forth on the effect of mitigating evidence on the trial court's power to impose a death sentence where the jury has rendered a life verdict. See Pentecost v. State, 545 So.2d 861, 863, n.3 (Fla. 1989).

in the record," citing a number of cases holding that uncontroverted evidence must be accepted as proof of a factual issue; and in Campbell, the court wrote:

> The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law.

This is a question of law. A mitigating circumstance can be defined broadly as "any aspect of the defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Valid nonstatutory mitigating circumstances include but are not limited to the following:

1) Abused or deprived childhood.

2) Contribution to community or society as evidenced by an examplary work, military, family, or other record.

3) Remorse and potential for rehabilitation; good prison record.

4) Disparate treatment of an equally culpable codefendant.

5) Charitable or humanitarian deeds.

This is a question of fact and the court's finding will be presumed correct and upheld on review if supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981).

The Supreme Court of Florida has affirmed death sentences in several cases, including the instant case, where this eighth statutory aggravating factor was found, without specifically stating that the homicide was "pitiless" or "torturous to the victim." See, e.g., Hallman v. State, 305 So.2d 180 (1974) (victim's throat slit with broken bottle); Spinkellink v. State, 313 So.2d 666 (1975) ("career criminal" shot sleeping traveling companion); Gardner v. State, 313 So.2d 675 (1975) (brutal beating and murder); Alvord v. State, 322 So.2d 533 (1975) (three women killed by strangulation, one raped); Douglas v. State, 328 So.2d 18 (1976) (depraved murder); Henry v. State, 328 So.2d 430 (1976) (torture murder); Dobbert v. State, 328 So.2d 433 (1976) (torture and killing of two children). But the circumstances of all of these cases could accurately be characterized as "pitiless" and "unnecessarily torturous," and it thus does not appear that the Florida Court has abandoned the definition that it announced in Dixon and applied in Alford, Tedder, and Halliwell.

571 So.2d at 419-20. In Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990), the court wrote that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved."

B. The patternless network of Florida decisions regarding mitigation has led directly to the unconstitutional treatment of Mr. Sochor's mitigating evidence. The trial court's sentencing order gave no consideration to the state's own evidence that Mr.

Sochor was out of his mind at the time of the offense,[10] gave no consideration to the non-statutory mitigating factors regarding Mr. Sochor's mental state at the time of the offense, and treated the substantial, competent, and unrebutted evidence regarding his childhood in summary fashion, giving it no effect in the weighing process of reaching the sentencing decision. The trial court used an improper standard regarding the extreme mental or emotional disturbance circumstance: the judge refused to apply the circumstance because Mr. Sochor did not meet the standard for involuntary hospitalization of mentally incompetent persons when examined in 1986, some five years after the offense. This standard is unconstitutional: if Mr. Sochor were mentally incompetent, he would not be tried, so that the extreme disturbance circumstance could never come into play. Hence, the standard used by the trial court would preclude consideration of evidence of mental disturbance at the time of the offense.

The Florida Supreme Court compounded the trial court's unconstitutional refusal to weigh uncontroverted mitigating evidence. Ignoring its own precedents such as Campbell (issue of whether a proven factor constitutes mitigation is a question of law; evidence of abused or deprived childhood is mitigating as a matter of law), Nibert (same), Hardwick (sentencer must consider uncontroverted evidence of alcohol or drug abuse) and Robinson v. State, 574 So.2d 108 (Fla. 1991) (psychosexual disorder found as mitigation) the court wrote that the judge and jury are free to

[10] Florida prosecutors are bound by the testimony of their main witnesses. Davis v. State, 90 So.2d 629, 632 (Fla. 1956); D.J.G. v. State, 524 So.2d 1024 (Fla.App. 1987).

ignore mitigating evidence. As to the overwhelming evidence of Mr. Sochor's sexual disorders, the court wrote: "It is difficult to discern whether such conduct is mitigating, but the decision as to whether a particular mitigating circumstance is proven lies with the judge and jury." As to the trial court's rejection of the statutory mental mitigating circumstances, the court wrote that it saw no reason to disturb the trial court's rejection of them. As to the evidence regarding Mr. Sochor's background, the court wrote: "Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion. King v. Dugger, 555 So.2d 355 (Fla. 1990); Scull v. State, 533 So.2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037 (1989). We find no abuse of discretion in finding that the evidence did not rise to being a mitigating circumstance."[11] Thus the supreme court gave no weight to the mitigating evidence, deferring entirely to the trial court.

C. In view of the foregoing, Mr. Sochor's death sentence is illegal: the trial court failed to consider valid mitigating evidence in violation of Hitchcock and did not make factual findings regarding mitigation as required by Proffitt, and the Florida Supreme Court did not, could not, undertake the full appellate review required by Proffitt. The treatment of mitigating evidence in Florida is so arbitrary that the application of mitigating factors to specific cases has become largely a matter of caprice. Hence, Florida's death penalty is applied in an unconstitutional manner.

[11] In King and Scull the court merely held that "An age of twenty-something is 'iffy' as a mitigating circumstance." King, 555 So.2d at 358 (citing Scull).

2. Inadequacy of appellate review.

After striking the "cold, calculated, and premeditated" aggravating circumstance, the Florida Supreme Court upheld Mr. Sochor's death sentence because the trial court found no mitigating circumstances. This was improper where the court did not reweigh the evidence, and it did not undertake a harmless error analysis.

A. Where a state appellate court has struck an aggravating circumstance, it must order resentencing unless it either reweighs the evidence and determines that the death sentence is still appropriate, or conducts a harmless error analysis and determines that the sentencer would have sentenced the defendant to death even without erroneous use of the aggravating circumstance. Parker v. Dugger, 111 S.Ct. 738-39, and Clemons v. Mississippi, 110 S.Ct. 1441 (1990). The Florida Supreme Court did neither at bar.

B. Although the Court understood in Proffitt v. Wainwright, 428 U.S. 242, 252-53 (1976) (plurality opinion) that the Florida Supreme Court would reweigh the sentencing circumstances in all capital cases, that court has consistently refused to do so. E.g. Freeman v. State, 563 So.2d 73, 77 (Fla. 1990) ("It is not this Court's function to reweigh these circumstances."). At bar, the court followed its practice and refused to reweigh the circumstances, deferring to the trial court's judgment regarding mitigation.

C. The court also failed to conduct a harmless error review, for to conduct such a review it would have had to consider the effect of the improper circumstance on the jury. Although the ultimate sentencing decision is the judge's, that decision is

strongly influenced by the jury's penalty verdict: where there is a life verdict, the judge can impose a death sentence only where no reasonable person could agree with imposition of a life sentence. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). This is a very high standard: in 1990, the court reversed every death sentence to come before it on direct review where there was a life verdict; in 1991 it has affirmed only one. A life verdict virtually mandates a life sentence. Hence, a sentencing error cannot be harmless unless it could have had no effect on jury's penalty verdict. The Florida Supreme Court has often, but not always, recognized this principle.

Exemplary of the court's confused approach is its decision reversing Thomas Trotter's death sentence on the ground that an aggravating circumstance had been improperly applied. In its initial decision, the court ordered resentencing by the judge. Trotter v. State, 16 Fla.L.W. S17, S18 (Fla. Dec. 20, 1990). But on rehearing, the court ordered a jury resentencing, with no explanation for the change in the relief granted. 576 So.2d 691, 694.

Two decisions rendered the same day further muddy the waters. In Capehart v. State, 16 Fla.L.W. S447 (Fla. June 13, 1991), the court affirmed Gregory Capehart's death sentence even though the trial court had improperly relied on the premeditation circumstance,[12] writing:

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[12] In addition to the premeditation circumstance, the trial court found three other aggravating circumstances (prior conviction of violent felony, engaged in sexual battery at time of murder, and especially heinous, atrocious, or cruel) and one mitigating circumstance ("Defendant is a poor black man exploding in anger

> Having determined one aggravating circumstance was erroneously considered by the trial judge, we must determine whether this error was harmless. The record before us reflects three valid aggravating circumstances and one nonstatutory mitigating circumstance. Having carefully scrutinized the record in this case, we are persuaded beyond a reasonable doubt that even without the aggravating circumstance of cold, calculated, and premeditated murder, the trial court still would have found that the aggravating circumstances outweighed the mitigating evidence. Thus, the error was harmless beyond a reasonable doubt. See, e.g., Holton, 573 So.2d at 293. We therefore affirm the sentence of death.

Id. S450. The court gave no explanation for how it arrived at the conclusion that the trial court would have sentenced Mr. Capehart to death without the premeditation circumstance. Equally curious was the court's failure to give any consideration to the effect that improper use of the circumstance might have had on the jury. Although the judge rejected most of Mr. Capehart's mitigating evidence, there was no reason to think that the jury did. One additional vote for life would have resulted in a life verdict,[13] which could scarcely be overridden given the substantial amount of mitigating evidence presented to the jury.

Capehart is difficult to reconcile with Omelus v. State, 16 Fla.L.W. S455 (Fla. June 13, 1991). At Ulrick Omelus's sentencing proceeding after he was convicted as the principal in a contract murder, the state argued three aggravating circumstances: the

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over his frustration due to the ills of a discriminatory society heaped upon him"), rejecting various other nonstatutory mental mitigating evidence. The jury recommended a death sentence by a vote of seven to five.

[13] A 6-6 tie is treated as a life verdict. Rose v. State, 425 So.2d 521, 525 (Fla. 1982), cert. denied, 461 U.S. 904 (1983).

pecuniary gain, premeditation, and heinousness circumstances. The trial court did not find the heinousness circumstance, but did apply the other two in sentencing Mr. Omelus to death pursuant to the jury's eight-to-four recommendation. The trial court found as a mitigating circumstance that the co-defendant, who actually committed the murder, was sentenced to life imprisonment. The supreme court found that the heinousness circumstance could not apply to Mr. Omelus,[14] and reversed the sentence for a jury resentencing, writing:

> Since the trial judge correctly did not include heinous, atrocious, or cruel as a factor in imposing the death sentence, the question that must be resolved in our harmless error analysis is whether the error in allowing this factor to be presented and considered by the jury requires a new sentencing proceeding. We find it difficult to consider the hypothetical of whether the trial court's sentence would have been an appropriate jury override if the jury had not received the argument on the heinous, atrocious, or cruel factor and had recommended a life sentence. Further, because the issue is not in this record, the parties have not argued the propriety of a jury override in the briefs or at oral argument. We conclude that it is not appropriate for us to attempt to address that question in this case under these circumstances. Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, given the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must conclude that this error is not

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[14] Although the evidence apparently showed that the killing itself would qualify for application of the circumstance, the evidence did not show that Mr. Omelus intended that the co-defendant inflict a high degree of pain.

> harmless beyond a reasonable doubt under the standard set forth in DiGuilio.

Id. S457. See also Jones v. State, 569 So.2d 1234, 1238-39 (Fla. 1990) (error to instruct jury on heinousness circumstance; resentencing before new jury ordered even though evidence regarding offense would not be different at resentencing).

The court took a different tack in Herring v. State, 16 Fla.L.W. S293 (Fla. May 2, 1991). In 1981, Ted Herring was charged with first degree murder of a convenience store clerk. The trial court followed the jury's eight-to-four recommendation of a death sentence, notwithstanding evidence of Mr. Herring's troubled childhood, psychological problems, learning disabilities, and low IQ. There was no evidence that he intended to kill the clerk prior to the robbery, but the trial court used the premeditation circumstance in sentencing him to death,[15] and the supreme court affirmed. Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984). Three years later, in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988),[16] the court specifically disapproved of the use of the circumstance in Mr. Herring's case. Accordingly, Mr. Herring argued on post-conviction that, under Rogers, his sentence was illegal. The supreme court rejected his claim:

> While the cold, calculated, and premeditated aggravating factor no longer applies to the

[15] In all, the trial court found four aggravating circumstances and two mitigating circumstances.

[16] The court wrote in Rogers: "Since we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in Herring v. State [cit.], to the extent it dealt with this question." 511 So.2d at 533.

> circumstances in Herring, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a "conviction of a prior crime of violence" had been eliminated, that would have changed the facts and circumstances before the jury.
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> The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. Herring I at 1057. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury. See Hill v. State, 515 So.2d 176 (Fla.1987), cert. denied, 485 U.S. 993 (1988).

Id. S294.

Capehart, Omelus, and Herring reflect completely different approaches to the issue. Under Capehart, the court looked only at the effect of the aggravating circumstance on the judge's sentencing decision, without regard to its possible effect on the jury. In Omelus, however, the court did look to the potential effect on the jury, even though the evidence would have been the same without the circumstance. In Herring the court also considered the effect of the error on the jury, but held that striking the circumstance could not have affected the verdict where

the striking did not affect the evidence.[17] Thus, the Florida Supreme Court has been inconsistent in its methods of determining whether to order resentencing where the jury has considered an improper circumstance. At bar, the court gave no consideration to the effect of the error on the jury, and simply held that the trial court "carefully" (albeit erroneously) weighed the evidence, and that it would not disturb its decision. Hence, the court erred in affirming Mr. Sochor's death sentence in violation of the principles set forth in Parker and Clemons.

3. Instructions on Uncharged Theories of Guilt.

Under section 787.01(1)(a), Florida Statutes, a person can be guilty of kidnapping if one confines, abducts, or imprisons another with intent: to hold the person for ransom, or to commit or facilitate commission of a felony, or to inflict bodily harm upon or to terrorize another, or to interfere with the performance of any governmental or political function. The indictment on which Mr. Sochor was tried charged kidnapping with intent only to commit the felony of sexual battery. R 1143; App. B. It alleged no intent to commit any other felony, and did not allege intent to inflict bodily harm or to terrorize. Under section 782.04(1), Florida Statutes, a person can be guilty of first degree murder if the killing was by "premeditated design" or if the killing occurred during the actual or attempted commission of any of several enumerated felonies. The indictment charged only murder "from a

[17] See also Jones v. State, 569 So.2d 1234 (Fla.1990) (new jury sentencing ordered where striking of heinousness circumstance would result in exclusion of evidence of sexual abuse on corpse).

premeditated design" and did not specify any theory of felony murder. R 1143; App. B.

Nevertheless, the jury was instructed not only on the charged theories of kidnapping with intent to commit sexual battery and murder from premeditated design, but also with the following uncharged theories: kidnapping with intent to commit bodily harm or to terrorize, R 928-29, and felony murder during the course of kidnapping or sexual battery, or during an attempt to commit one of those offense, or while escaping from the scene of one of those offenses. R 923. Mr. Sochor contended in the Florida Supreme Court, and contends now that the instruction of the jury on the uncharged theories violated the Notice Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments.

The Court wrote in Cole v. Arkansas, 333 U.S. 196, 201 (1948):

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding....It as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

See also Dunn v. United States, 442 U.S. 100, 106-107 (1979). Similarly, the primary requirements of the Notice Clause are that the charging document inform the defendant of the nature of the accusation and "inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction, if one should be had." Russell v. United States, 369

U.S. 749, 767, 768 (1962). The charging document must not be so framed as to let the prosecution "shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." Id. 768.

The charging document at bar violated these constitutional provisions. Mr. Sochor was tried on uncharged statutory theories and his resulting convictions are unconstitutional.

4. "Especially heinous, atrocious or cruel" aggravating circumstance.

Florida's "especially heinous, atrocious, or cruel" circumstance has been the subject of controversy and criticism for years. Commentators have written that it has not been applied consistently by the Florida Supreme Court and that the court has adopted confusing and contradictory guidelines for its application.[18] In Proffitt v. Florida, 428 U.S. 242 (1976) the Court upheld the constitutionality of the circumstance based on an interpretation of the circumstance which the Florida Supreme Court has since abandoned. The circumstance is now unconstitutional under Proffitt, Maynard v. Cartwright, 486 U.S. 356 (1988) (Oklahoma "especially heinous, atrocious or cruel" circumstance unconstitutionally vague), and Shell v. Mississippi, 111 S.Ct. 313 (1990) (Mississipi instruction on same circumstance unconstitutionally vague).

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[18] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 908 (1989); Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases -- The Standardless Standard, 64 N.C.L. Rev. 941 (1986); and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, 13 Stetson L.Rev. 523 (1984).

In Proffitt, the Court wrote:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, ...[s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So.2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d, at 9. See also Alford v. State, 307 So.2d 433, 445 (1975); Halliwell v. State, supra, 323 So.2d at 561.[12] We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See Gregg v. Georgia, ante, 428 U.S., at 200-203.

428 U.S. at 254-56 (opinion of Court joined by three justices with four justices concurring).

But in 1981, Florida promulgated standard jury instructions deleting the construction approved in Proffitt, so that Mr. Sochor's jury was instructed only in the bare terms of the statute.[19] In 1984, the court approved the 1981 instructions and eliminated from the statute the constitutionally approved construction. Pope v. State, 441 So.2d 1073, 1077-788 (1984) ("No

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[19] The standard instructions, used in instructing Mr. Sochor's jury, provide:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
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> ....
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> 8. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

R 1221.

further definitions of the terms are offered, nor is the defendant's mindset ever at issue."). Since then, the court has wavered dramatically in its application of the mental element set out in State v. Dixon and approved in Proffitt. Thus, in Mills v. State, 476 So.2d 172, 178 (Fla. 1985) the court wrote that application of the circumstance depended on the intent of the defendant, and in Porter v. State, 564 So.2d 1060 (Fla. 1990), the court reversed a finding of the circumstance because the record did not show a torturous intent as required by State v. Dixon,[20] while in Hitchcock v. State, 578 So.2d 685, 692 (Fla. 1990), it wrote that the absence of a torturous intent is irrelevant: "That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This

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[20] The court wrote:

> We agree that the murder of Williams did not stand apart from the norm of capital felonies, nor did it evince extraordinary cruelty. We see little distinction between this case and Amoros v. State, 531 So.2d 1256, 1261 (Fla.1988), wherein the Court struck the trial court's finding of especially heinous, atrocious, or cruel on a finding that the murderer fired three shots into the victim at close range. Moreover, this record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful. The state has not met its burden of proving this factor beyond a reasonable doubt, and the trial court erred in finding to the contrary.

564 So.2d at 1063 (emphasis in original).

aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's."

At bar, the trial court made no finding of the torturous intent required by Porter and the cases cited therein. The evidence shows that Mr. Sochor, like Mr. Porter, acted in a blind rage. Hence the application of the circumstance in this case was unconstitutionally arbitrary: the jury was given no instruction defining the circumstance, the trial court did not make the requisite findings, and the Florida Supreme Court's treatment of the circumstance varies wildly from case to case so that it cannot be applied in a constitutional manner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Gary Caldwell, Esq.
Assistant Public Defender
Capital Crimes Division

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So.2d 154, 156 (Fla.

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OVERTON,
KETT, GRIMES,
DING, JJ., concur.

FOR REHEARING
Rehearing is denied.
atisfied this Court that
been restored, Sheldon
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r proceedings if he is

readmitted to practice in his home state of New York within twelve (12) months.

SHAW, C.J., and OVERTON, McDONALD, BARKETT, GRIMES, KOGAN and HARDING, JJ., concur.

Dennis SOCHOR, Appellant,

v.

STATE of Florida, Appellee.

No. 71407.

Supreme Court of Florida.

May 2, 1991.

Rehearing Denied June 18, 1991.

Defendant was convicted of kidnapping and first-degree murder, and was sentenced to death, in the Circuit Court, Broward County, Russell E. Seay, Jr., J., and defendant appealed. The Supreme Court held that: (1) evidence was sufficient for jury to have found that murder was premeditated; (2) evidence of kidnapping was sufficient to support conviction on felony-murder theory; (3) State independently proved corpus delicti of homicide, and therefore defendant's confessions were admissible, even though victim's body had never been found; (4) evidence supported aggravating death penalty factors that defendant had been previously convicted of violent felony, that murder was committed during felony, and that murder was especially heinous, atrocious, or cruel, but did not support aggravating factor that murder was committed in cold, calculated and premeditated manner; and (5) striking one aggravating factor when there were no mitigating circumstances did not necessarily require resentencing.

Affirmed.

1. Homicide ⇐312

Jury verdict form indicating whether jurors found defendant guilty of first-degree murder based on premeditation or felony-murder was not required.

2. Homicide ⇐232, 269

Evidence was sufficient to present issue of premeditation to jury in trial for first-degree murder and to allow jury to find premeditation, where defendant's brother testified that, while victim screamed for help, brother interrupted defendant who stopped assaulting victim long enough to turn, look at brother, and shout at him to get back in truck, and that defendant then resumed his attack.

3. Homicide ⇐18(1)

Evidence of kidnapping was sufficient to support first-degree murder conviction on felony-murder theory, even though victim might have entered defendant's truck voluntarily, where victim at some point was held unwillingly, and her removal to secluded area facilitated defendant's acts, avoided detection, and was not merely incidental to or inherent in the crime.

4. Kidnapping ⇐5

Evidence supported kidnapping conviction, even though victim might have entered defendant's truck voluntarily, where victim was at some point held unwillingly, and removal of victim to secluded area facilitated defendant's acts, avoided detection, and was not merely incidental to or inherent in the crime.

5. Homicide ⇐235

Evidence of attempted sexual battery was sufficient to support first-degree murder conviction on felony-murder theory, where defendant stated that he wanted to have sex with victim and that he felt uncontrollable urge to do so, defendant stated that he thought the next day that he had raped "another girl," and defendant's brother testified that he saw defendant on top of victim while she resisted.

6. Criminal Law ⇐535(1)

Confession to crime is insufficient evidence of criminal act where no independent

evidence exists to substantiate occurrence of crime.

7. Criminal Law ⇐563

Circumstantial evidence is sufficient to prove corpus delicti.

8. Criminal Law ⇐563

Proof beyond reasonable doubt is not necessary to prove corpus delicti.

9. Criminal Law ⇐517.3(4)

Evidence was sufficient to prove corpus delicti of first-degree murder, and therefore defendant's confessions were admissible, even though victim's body was never found, where victim's disappearance was uncharacteristic, defendant's brother testified that victim was screaming for help with defendant on top of her when he last saw victim, and defendant did not contest in closing argument that victim was dead.

10. Criminal Law ⇐1030(1)

Contemporaneous objection rule does not have less force in capital case.

11. Criminal Law ⇐1030(1)

Error must amount to denial of due process to be fundamental error. U.S.C.A. Const.Amends. 5, 14.

12. Criminal Law ⇐1030(1), 1186.1

Fundamental error did not result from claimed errors, taken individually or collectively, that prosecution made comments on facts outside of evidence in capital murder trial, that government witnesses gave opinions as to defendant's veracity and guilt, that defense witness stated on cross examination that person from prosecutor's office had compared defendant to notorious serial killer, that State had argued that defendant's trial was the only time the State could try him for his crimes, that evidence was admitted as to defendant's bad character and victim's good character, beauty, and family, and that jailhouse informant gave perjured testimony as to whether he received leniency from State in return for testimony regarding defendant's incriminating statements.

13. Criminal Law ⇐1038.1(2), 1038.3

In absence of fundamental error, defendant's claims of error in jury instructions were precluded from appellate review, where defense counsel neither objected to instructions nor requested other instructions.

14. Homicide ⇐28

Voluntary intoxication is defense to felony-murder when underlying felony is specific-intent crime.

15. Kidnapping ⇐1

Kidnapping is specific-intent crime. West's F.S.A. § 787.01.

16. Criminal Law ⇐1030(1)

"Fundamental error" is error which goes to foundation of case.

See publication Words and Phrases for other judicial constructions and definitions.

17. Criminal Law ⇐1038.2

Failure to give instruction unnecessary to prove essential element of crime charged is not fundamental error.

18. Criminal Law ⇐53

Voluntary intoxication is defense to, but not essential element of, kidnapping.

19. Homicide ⇐28

State did not have to disprove defendant's claim of voluntary intoxication in order to convict defendant of felony-murder based on underlying felony of kidnapping.

20. Homicide ⇐325

Trial court did not commit fundamental error by failing to instruct jury on voluntary intoxication as defense to felony-murder based on kidnapping, but instead objection was necessary to preserve issue for appeal, especially where there was sufficient evidence of attempted sexual battery, which was general intent crime to which voluntary intoxication was not defense, upon which to base conviction of felony-murder.

21. Criminal Law ⇐1038.2

Trial court did not commit fundamental error by failing to instruct jury on statute of limitation as absolute defense to felony-murder and kidnapping, where State could have shown that, even though defen-

dant was indicted for ki
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§ 775.15(6).

22. Criminal Law ⇐147
Capital crimes are no
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§ 775.15(1).

23. Criminal Law ⇐118
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§ 775.15(1).

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27. Homicide ⇐159
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28. Homicide ⇐358(1)
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APP A

dant was indicted for kidnapping beyond applicable four-year limitation period, his undisputed, continuous absence from State tolled running of statute. West's F.S.A. § 775.15(6).

22. Criminal Law ⇐147

Capital crimes are not subject to statute of limitation. West's F.S.A. § 775.15(1).

23. Criminal Law ⇐1186.1

First-degree murder conviction would not have to be overturned, even if limitation period had expired on underlying felony supporting felony-murder theory, since first-degree murder was not subject to statute of limitation. West's F.S.A. § 775.15(1).

24. Homicide ⇐325

Failure to give long-form excusable homicide instruction was not fundamental error in trial for first-degree murder.

25. Homicide ⇐325

To preserve issue as to whether State improperly introduced victim impact evidence during penalty phase of capital murder trial, objection must be made.

26. Homicide ⇐325

Defendant's points that State introduced improper evidence during penalty phase of capital murder trial regarding prior violent acts, and introduced improper hearsay testimony of, and taped confession to, rape of which there was no conviction, were procedurally barred, where defendant's counsel did not object to that testimony.

27. Homicide ⇐159

Defendant's ex-wife's testimony regarding defendant's prior violent acts was admissible during penalty phase of capital murder trial to rebut defense that defendant became violent only after consuming alcohol, since ex-wife testified to violent acts when defendant was sober.

28. Homicide ⇐358(1)

Testimony regarding rape in Michigan for which defendant had not been convicted was relevant and admissible during penalty phase of capital murder to rebut mitigating factor of no significant history of prior criminal activity.

29. Criminal Law ⇐662.40
Homicide ⇐358(1)

Defendant's taped confession to rape for which defendant had not been convicted was admissible during penalty phase of capital murder trial, and did not violate *Rhodes* doctrine that admission of victim's taped statement violates defendant's confrontation rights.

30. Homicide ⇐325

Alleged errors in jury instructions during penalty phase of capital murder trial had not been preserved for appeal, where defendant did not object to those instructions at trial.

31. Homicide ⇐311

Felony-murder instruction was not inadequate during penalty phase of capital murder trial, even though it did not define the underlying felony, where trial court had instructed jury on underlying felonies during guilt phase.

32. Homicide ⇐357(5)

Aggravating sentencing factor in trial for capital murder that defendant had been previously convicted of violent felony was applicable regardless of whether defendant was convicted of first-degree murder based on premeditation theory or felony-murder theory.

33. Criminal Law ⇐1035(8), 1037.1(2)

Defendant's claim that prosecutor and trial court denigrated jury's rule during penalty phase of capital murder trial had not been preserved for review, where defendant did not raise such claim at trial.

34. Homicide ⇐357(5)

Evidence supported aggravating death penalty factor that murder was committed during felony, where there was sufficient evidence of both kidnapping and attempted sexual battery. West's F.S.A. § 921.141(5)(d).

35. Homicide ⇐357(11)

Evidence supported aggravating death penalty factor that murder was especially heinous, atrocious, or cruel, even though victim's body had never been found, where defendant's brother testified that victim screamed for help after she was dragged from truck, scratches on defendant's face indicated that struggle took place, and defendant confessed that he choked victim to death. West's F.S.A. § 921.141(5)(h).

36. Homicide ⇐357(3)

Evidence failed to establish aggravating death penalty factor that murder was committed in cold, calculated, and premeditated manner, even though there was sufficient evidence to support premeditated murder conviction, where killing most likely resulted from victim's refusal to have consensual sex with defendant and her resistance when he attempted to force himself upon her. West's F.S.A. § 921.141(5)(i).

37. Homicide ⇐357(4)

Trial court properly rejected as mitigating death penalty factors that defendant was under influence of extreme mental or emotional disturbance and that his capacity to appreciate criminality of his conduct or conform his conduct to requirements of law was substantially impaired, even though there was evidence that defendant had used alcohol on night in question, there was medical testimony that defendant was dangerous and violent person when drinking, and defendant explained that he had irresistible impulse when sexually aroused; one doctor testified that defendant had not been truthful during testing and another testified that defendant had "selective amnesia."

38. Homicide ⇐357(4)

Trial court did not abuse its discretion in finding that nonstatutory evidence did not rise to mitigating death penalty circumstance, despite testimony relating defendant's physical abuse by his father, his financial support of family when his father was unable to work, his alcohol problems, and his violent temper and mental instability.

39. Homicide ⇐345

Striking one aggravating death penalty factor when there were no mitigating circumstances did not necessarily require resentencing.

40. Homicide ⇐357(4)

First-degree murder defendant's death sentence was not disproportionate, where there were three aggravating factors weighed against no mitigating circumstances.

Richard L. Jorandby, Public Defender and Gary Caldwell, Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., and Celia A. Terenzio, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Dennis Sochor appeals his convictions of kidnapping and first-degree murder and sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the convictions and the death sentence.

Testimony at trial established that, on December 31, 1981, the victim, an eighteen-year-old female, and a friend went to a lounge located in Broward county to celebrate New Year's Eve. During the course of the evening the friend became ill. Sochor and his brother, Gary, helped the victim escort her friend outside to her car. Promising her that she would return soon, the victim returned to the lounge.

Early the next morning the friend awoke in the car, discovered the victim missing, and called the police. The police obtained a photograph taken that night which showed an unidentified man sitting at the bar near the victim. The photograph was shown on television, and, several days later, that man was identified as Sochor. The police talked with Sochor's roommates who said that he had left suddenly when he saw his picture on television. They also told police that Sochor's brother, Gary, had been visiting him and had recently returned to Michigan. The police interviewed Gary who implicated his brother in the victim's disappearance and voluntarily returned to Florida to attempt to locate her body. In May 1986 authorities arrested Sochor in Georgia on

an unrelated offense and extradited him to Florida where a grand jury indicted him on charges of first-degree murder and kidnapping. The victim's body has never been recovered.

At trial Gary gave the following testimony. He went to the lounge on New Year's Eve with his brother who spent the evening talking with the victim and her friend. When it came time to leave, the victim and his brother were kissing in the lounge parking lot while Gary waited in the truck. Several minutes later, she agreed to go to breakfast with them. They left the parking lot with Sochor driving his employer's truck, Gary in the passenger seat, and the victim seated between them. Sochor drove to a secluded spot nearby and stopped the truck. Gary remembered the victim screaming for help and seeing Sochor on top of her with her hands pinned down on the ground. He yelled at him and threw a rock over his head. In response Sochor stopped assaulting the victim, turned and looked at Gary like a man "possessed," angrily told him to get back in the truck, and resumed his assault. Awhile later Sochor got in the truck with Gary and drove home. The next morning Gary found a woman's shoe and sweater and a set of keys in the truck. He hid the keys. Later he noticed that the truck had been cleaned and the articles removed. When told about the keys, Sochor became upset and demanded their return, which Gary did. A few days later Gary returned to Michigan.

The state also introduced Sochor's three taped confessions which it played to the jury. In these statements Sochor said that he met the victim that night at the bar and spent the evening talking with her. He remembered kissing her in the lounge parking lot and wanting to have sex. When she refused, they argued and he grabbed her. When she hit him, he became angry and choked her. He thought that he killed her and drove to a secluded area where he disposed of the body. He said that Gary was not with him when this happened. When he awoke the next morning, he remembered feeling that something terrible had happened. He thought he had raped "another girl." He also stated that he found several woman's articles in the truck which he put in the trash. When he saw his picture on television, he took his employer's truck and drove to Tampa.[1] From there he went to New Orleans where he stayed for some time before moving to Atlanta where he was arrested.

The jury convicted Sochor of both kidnapping and first-degree murder and, by a vote of ten to two, recommended the death penalty. The trial judge sentenced Sochor to death, finding four aggravating,[2] and no mitigating, circumstances. Sochor now appeals, claiming errors in both the guilt and sentencing phases of his trial.

[1] Sochor raises numerous claims of error in the guilt phase. His first claim is that there was insufficient evidence to convict him of either premeditated or felony murder.[3] Assuming that there are sufficient facts to present the issue to the jury, whether the evidence shows premeditation is a question of fact for the jury to decide. *Preston v. State*, 444 So.2d 939 (Fla.1984). As this Court has previously stated:

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of his victim is concerned. No definite length of time for it to exist has been set and indeed could not be.

Larry v. State, 104 So.2d 352, 354 (Fla. 1958). *Accord Preston; Sireci v. State*, 399 So.2d 964 (Fla.1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982).

[2] After examining the record, we find sufficient evidence to present the issue of premeditation to the jury and from which the jury could have found premeditation. In addition to the circumstances of the crime, Gary testified that, while the victim screamed for help, he interrupted Sochor who stopped assaulting her long enough to turn, look at Gary, and shout at him to get back in the truck. Sochor then resumed his attack. Thus, he had a sufficient period of reflection to contemplate the nature of his act. He could have stopped his assault at that point but chose to continue. We find Sochor's claim that the offense was a heat-of-passion type homicide insufficient to preclude a finding of premeditation.

[3–5] We also find sufficient evidence of kidnapping to support Sochor's conviction on a felony-murder theory.[4] The evidence adduced at trial shows that, although the victim may have entered the truck voluntarily, at some point she was held unwillingly. Her removal from the lounge parking lot to a secluded area facilitated Sochor's acts, avoided detection, and was not merely incidental to, or inherent in, the crime. Thus, the evidence supports the underlying felony of kidnapping as well as Sochor's separate conviction of kidnapping. *See Carron v. State*, 427 So.2d 192 (Fla. 1983); *Faison v. State*, 426 So.2d 963 (Fla. 1983); *Mobley v. State*, 409 So.2d 1031 (Fla.1982).[5]

[6–9] Sochor next claims that the trial court improperly admitted his confessions because the state did not independently prove the corpus delicti of the homicide. An individual's confession to a crime is insufficient evidence of a criminal act where no independent evidence exists to substantiate the occurrence of the crime. *State v. Allen*, 335 So.2d 823 (Fla.1976). Because the victim's body has never been found, Sochor contends that the state has no evidence, other than his confession, that she is dead. In proving corpus delicti, however, circumstantial evidence is sufficient. *Buenoano v. State*, 527 So.2d 194 (Fla. 1988). Proof beyond a reasonable doubt is not necessary. *Stano v. State*, 473 So.2d 1282 (Fla.1985), *cert. denied*, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986); *Bassett v. State*, 449 So.2d 803 (Fla.1984). The victim disappeared New Year's Eve and has not been seen since that night. It was uncharacteristic for her not to come home. She had a good relationship with her family and her boyfriend and kept in touch. None of her belongings were missing from her apartment. Gary testified that when he last saw the victim she was screaming for help with his brother on top of her. We find sufficient evidence that the victim is indeed dead and that her death was due to the criminal agency of Dennis Sochor. Moreover, Sochor, in closing argument, did not contest the fact that she was dead. Rather, counsel based the defense strategy on the theories of voluntary intoxication or mistaken identity, i.e., that Gary actually committed the crime.[6]

[10] Sochor next compl
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did not object at trial to a
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preserved for review. *See*
Sykes, 433 U.S. 72, 97
L.Ed.2d 594 (1977); *Jones*
So.2d 253 (Fla.), *cert. denie*
105 S.Ct. 269, 83 L.Ed.2d 2
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706 (1985); *see Pope v. W*
So.2d 798 (Fla.1986), *cert. d*
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[11, 12] As to the first
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1978). After carefully
record, we find that the
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constitute fundamental err
reject Sochor's claim.

[13] Likewise, althoug
claims various errors in t
tions, his counsel neither
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1. Several weeks after the victim's disappearance police found the truck abandoned in Tampa.

2. The court found the following aggravating factors: (1) Sochor was previously convicted of a felony involving the use or threat of violence to the person, § 921.141(5)(b), Fla.Stat. (1989); (2) the killing was committed while Sochor was engaged in the commission of a felony, § 921.141(5)(d); (3) the killing was especially heinous, atrocious, or cruel, § 921.141(5)(h); and (4) the killing was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, § 921.141(5)(i).

3. The verdict form did not indicate whether the jurors found Sochor guilty of first-degree murder based on premeditation or felony murder. Defense counsel neither requested such a specialized jury verdict form nor is one required. *Brown v. State*, 473 So.2d 1260 (Fla.), *cert. denied*, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985).

4. The court instructed the jury that it could find felony murder based on the felonies of kidnapping or sexual battery, attempt to commit either crime, or escaping from the immediate scene of a kidnapping or sexual battery.

5. We also find sufficient evidence in the record to support the underlying felony of attempted sexual battery. Sochor stated that he wanted to have sex with the victim and that he felt an uncontrollable urge to do so. The next day he thought he had raped "another girl." Gary testified that he saw Sochor on top of the victim while she resisted.

6. Sochor also contends there was insufficient evidence of venue and that the state failed to prove his sanity at the time of the offense beyond a reasonable doubt. We find these claims without merit.

7. Sochor contends that the fo
damental error: (1) prosecuto
facts outside the evidence;
government witnesses as to
and guilt; (3) a defense witn
cross-examination that an in
prosecutor's office compare
Bundy; (4) arguments by the
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for his crimes; (5) other evi
bad character, the victim's goo

[10] Sochor next complains of various errors which, taken as a whole, led to an unfair trial. He acknowledges that counsel did not object at trial to any of the complained-of errors and, pursuant to the contemporaneous objection rule, they are not preserved for review. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Jones v. State*, 449 So.2d 253 (Fla.), *cert. denied*, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984). Despite the lack of objections, Sochor contends that (1) the trial was so unfair that fundamental error occurred and (2) the contemporaneous objection rule has less force in a capital case. This Court has previously rejected the second argument. *Rose v. State*, 461 So.2d 84 (Fla.1984), *cert. denied*, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985); *see Pope v. Wainwright*, 496 So.2d 798 (Fla.1986), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1617, 94 L.Ed.2d 801 (1987); *Jones v. Wainwright*, 473 So.2d 1244 (Fla. 1985).

[11, 12] As to the first argument, fundamental error occurs in cases "where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." *Ray v. State*, 403 So.2d 956, 960 (Fla.1981). The error must amount to a denial of due process. *Ray; Castor v. State*, 365 So.2d 701 (Fla. 1978). After carefully reviewing the record, we find that the claimed errors, taken individually or collectively, do not constitute fundamental error.[7] Thus, we reject Sochor's claim.

[13] Likewise, although Sochor now claims various errors in the jury instructions, his counsel neither objected to the challenged instructions nor requested other instructions. Thus, in the absence of fundamental error, these claims also are precluded from appellate review. *See Adams v. State*, 412 So.2d 850 (Fla.), *cert. denied*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); *Castor*. Some of Sochor's claims on this issue merit no discussion;[8] however, others require inquiry.

[14, 15] We first examine Sochor's argument that the trial court committed fundamental error by failing to instruct the jury on voluntary intoxication as a defense to felony murder based on kidnapping. Voluntary intoxication is a defense to felony murder when the underlying felony is a specific-intent crime. *Linehan v. State*, 476 So.2d 1262 (Fla.1985). Kidnapping is a specific-intent crime. *Heddleson v. State*, 512 So.2d 957 (Fla. 4th DCA 1987); *Mullin v. State*, 425 So.2d 219 (Fla. 2d DCA 1983); *see* § 787.01, Fla.Stat. (1989). Although the trial court instructed the jury that voluntary intoxication was a defense to premeditated murder, it did not so instruct the jury with regard to felony murder.

[16–20] Fundamental error is error which goes to the foundation of the case. *Sanford v. Rubin*, 237 So.2d 134 (Fla.1970). Failure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error. Voluntary intoxication is a defense to, but not an essential element of, kidnapping. Therefore, the state did not have to disprove voluntary intoxication in order to convict Sochor of felony murder based on the underlying felony of kidnapping. Because the complained-of instruction went to Sochor's defense and not to an essential element of the crime charged, an objection was necessary to preserve this issue on appeal. Moreover, there was sufficient evidence of attempted sexual battery, a general-intent crime to which voluntary intoxication is not a defense,[9] upon which to base a conviction of felony murder. Sochor's claim as to this point therefore fails.

[21–23] We also address Sochor's argument that the trial court fundamentally erred by failing to instruct the jury on the statute of limitation as an absolute defense to felony murder and kidnapping. This, too, is a defensive matter that must be raised at trial. Had it been raised, the state could have shown that, even though Sochor was indicted for kidnapping beyond the applicable four-year limitation period, his undisputed, continuous absence from the state tolled the running of the statute. *See* § 775.15(6), Fla.Stat. (1989). Thus, the trial court did not commit fundamental error by failing to instruct the jury in this regard. In addition, capital crimes are not subject to a statute of limitation. § 775.15(1), Fla.Stat. (1989). Hence, Sochor's argument that his murder conviction must be overturned and remanded for a new trial because the limitation period had expired on several of the underlying felonies supporting a possible felony-murder theory is untenable.

[24] Finally, we recently held that the failure to give the long-form excusable homicide instruction is not fundamental error. *State v. Smith*, 573 So.2d 306 (Fla. 1990). Sochor's claim as to this point thereby fails.

Our review of the record shows competent, substantial evidence to support Sochor's convictions of kidnapping and first-degree murder. We therefore affirm those convictions.

[25] Turning to the penalty phase, Sochor's first claim is that the trial court improperly allowed the state to present and argue nonstatutory aggravating circumstances. To begin with, Sochor contends that the state introduced victim impact evidence in violation of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). Sochor's *Booth* claim is predicated upon prosecutorial comments and arguments to which no objection was made. To preserve a *Booth* issue an objection must be made. In our view, had there been an objection, it would not have been sustained. Thus, this issue is procedurally barred and lacks substance. *Parker v. Dugger*, 550 So.2d 459 (Fla.1989); *Jackson v. Dugger*, 547 So.2d 1197 (Fla.1989).

Sochor also contends that the state presented evidence of his lack of remorse, an improper aggravating circumstance. *Pope v. State*, 441 So.2d 1073 (Fla.1983). After reviewing the record, we find that the prosecutor's comments during closing argument in their totality did not rise to such a level as to pinpoint lack of remorse or warrant a new sentencing trial. *See Bertolotti v. State*, 476 So.2d 130 (Fla. 1985).

[26–29] Sochor further contends that the state introduced improper evidence of prior violent acts through the testimony of his ex-wife, Patricia Neal, and introduced improper hearsay testimony of, and his taped confession to, a rape in Michigan of which there was no conviction. In neither instance did Sochor's counsel object to the testimony, and these points are therefore procedurally barred. Moreover, Ms. Neal's testimony was introduced to rebut Sochor's defense that he became violent only after consuming alcohol; she testified to violent acts by Sochor when he was sober. The testimony regarding the Michigan rape was relevant to rebut the mitigating factor of no significant history of prior criminal activity. The playing of Sochor's taped confession during the penalty phase did not violate *Rhodes v. State*, 547 So.2d 1201 (Fla.1989). Thus, we find no error in these claims. Lastly, Sochor's claim of error with regard to improper prosecutorial comments on this evidence during closing argument has no merit.

[30–32] Sochor's next claim, regarding alleged errors in the penalty jury instructions, likewise must fail. None of the complained-of jury instructions were objected to at trial, and, thus, they are not preserved for appeal. *Vaught v. State*, 410 So.2d 147 (Fla.1982). In
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[33] Sochor also claims
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472 U.S. 320, 105 S.Ct. 263
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7. Sochor contends that the following were fundamental error: (1) prosecutorial comments on facts outside the evidence; (2) opinions of government witnesses as to Sochor's veracity and guilt; (3) a defense witness's statement on cross-examination that an individual from the prosecutor's office compared Sochor to Ted Bundy; (4) arguments by the state that Sochor's trial was the only time the state could try him for his crimes; (5) other evidence of Sochor's bad character, the victim's good character, beauty, and family; and (6) perjured testimony by a jailhouse informant as to whether he received leniency from the state in return for his testimony regarding Sochor's incriminating statements.

8. We reject without discussion Sochor's claims that the trial court fundamentally erred by failing to properly instruct the jury as to: nondeath lesser-included offenses; manslaughter; third-degree murder; and kidnapping.

9. *Buford v. State*, 492 So.2d 355 (Fla.1986).

10. Sochor contends that the
struction was inadequate be
fine the underlying felony a
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only applicable to premedit
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stance is applicable to both
premeditated murder. *Whit*
331 (Fla.1981), *cert. denied*,
S.Ct. 3571, 77 L.Ed.2d 1412

So.2d 147 (Fla.1982). In any event, Sochor's claims here have no merit.[10]

[33] Sochor also claims that the prosecutor and trial court denigrated the jury's role in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate *Caldwell*. *Combs v. State*, 525 So.2d 853 (Fla.1988); *Grossman v. State*, 525 So.2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). Further, Sochor did not raise this claim at trial. Thus, it has not been preserved for review. *Combs*; *Jackson v. State*, 522 So.2d 802 (Fla.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988).

[34] Turning to the actual sentence, Sochor claims that the evidence did not support three of the four aggravating factors found by the trial court. He does not contest the finding of a previous conviction of a violent felony, and we find this aggravator supported by the record. Sochor does contest the finding that the murder was committed during a felony. We have already found sufficient evidence of both kidnapping and attempted sexual battery. Thus, the evidence supports this aggravating factor.

[35] The evidence also supports finding that the murder was especially heinous, atrocious, or cruel. Fear and emotional strain can contribute to the heinousness of the murder. *Adams*, 412 So.2d at 857. Gary testified that the victim screamed for help after she was dragged from the truck and scratches on Sochor's face indicate that a struggle took place. The evidence supports the conclusion of horror and contemplation of serious injury or death by the victim. Moreover, Sochor confessed that he choked the victim to death. It can be inferred that "strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." *Tompkins v. State*, 502 So.2d 415, 421 (Fla.1986) (citations omitted), *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987). *Accord Johnson v. State*, 465 So.2d 499 (Fla.), *cert. denied*, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); *Doyle v. State*, 460 So.2d 353 (Fla. 1984). The trial court properly found this aggravating factor.

[36] We disagree, however, that the murder was committed in a cold, calculated, and premeditated manner. Although there was sufficient evidence to support a premeditated murder conviction, this aggravator requires a "heightened" level of premeditation. *Hamblen v. State*, 527 So.2d 800 (Fla.1988). The evidence introduced at trial failed to demonstrate this requisite heightened level of premeditation. Rather, the killing most likely resulted from the victim's refusal to have consensual sex with Sochor and her resistance when he attempted to force himself upon her.

[37] Sochor argues that the court should have found as mitigating factors that he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. In proof he relies on evidence of his alcohol use the night in question and on doctors' testimony that he was a dangerous and violent person when drinking. Sochor is an admitted rapist. As testified to by his ex-wife and the victim of a prior rape, when they declined to accede to Sochor's requests for sex he became violent. He himself explains that, when sexually aroused, an indescribable feeling comes over him in the form of an irresistible impulse, particularly when drinking. It is difficult to discern whether such conduct is mitigating, but the decision as to whether a particular mitigating circumstance is proven lies with the judge and jury. Reversal is not warranted simply because the appellant arrives at a different conclusion. *Stano v. State*, 460 So.2d 890 (Fla.1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). Although several doctors testified as to Sochor's mental instability, one testified that Sochor had not been truthful during testing and another testified that Sochor had "selective amnesia." While the sentencing order mentioned that Sochor had been found competent to stand trial and did not require Baker Act hospitalization, it is clear from the record that this is not the standard the court used in sentencing Sochor. We see no reason to disturb the court's rejection of these mitigating factors.

[38] Sochor also argues that the trial court failed to consider and improperly excluded nonstatutory mitigating evidence. The court in its sentencing order stated "[t]here were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory 'mitigating' circumstances." This testimony related Sochor's physical abuse by his father, his financial support of the family when his father was unable to work, his alcohol problems, and his violent temper and mental instability. The trial judge considered the evidence of family and personal history, but determined it was so insignificant that it had not been established as a mitigating circumstance. Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion. *King v. Dugger*, 555 So.2d 355 (Fla.1990); *Scull v. State*, 533 So.2d 1137 (Fla.1988), *cert. denied*, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989). We find no abuse of discretion in finding that the evidence did not rise to being a mitigating circumstance.

[39, 40] We also disagree with Sochor's claim that his death sentence is disproportionate. The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing. *Robinson v. State*, 574 So.2d 108 (Fla.1991); *Holton v. State*, 573 So.2d 284 (Fla.1990); *James v. State*, 453 So.2d 786 (Fla.), *cert. denied*, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984); *Francois v. State*, 407 So.2d 885 (Fla.1981), *cert. denied*, 458 U.S. 1122, 102 S.Ct. 3511, 73 L.Ed.2d 1384 (1982). Under the circumstances of this case, and in comparison with other death cases, we find Sochor's sentence of death proportionate to his crime. *E.g., Hitchcock v. State*, 578 So.2d 685 (Fla.1990); *Tompkins*; *Doyle*.

Finally, we have previously rejected claims that Florida's sentencing process is unconstitutional. *Young v. State*, 579 So.2d 721 (Fla.1991); *Gunsby v. State*, 574 So.2d 1085 (Fla.1991); *Van Poyck v. State*, 564 So.2d 1066 (Fla.1990).

We therefore affirm the convictions of kidnapping and first-degree murder and the death sentence.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, BARKETT, GRIMES and KOGAN, JJ., concur.

10. Sochor contends that the felony-murder instruction was inadequate because it did not define the underlying felony and did not inform the jury that this aggravating circumstance was only applicable to premeditated murder. We reject this claim because the court instructed the jury on the underlying felonies during the guilt phase and because this aggravating circumstance is applicable to both felony murder and premeditated murder. *White v. State*, 403 So.2d 331 (Fla.1981), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983). We reject without discussion Sochor's other claims: that the instructions as to the aggravating factors of heinous, atrocious, or cruel and cold, calculated, and premeditated were improper; that the instructions as to statutory and nonstatutory mitigating evidence were improper; that the jury was improperly instructed as to the burden and standard of proof with regard to mitigating circumstances; and that Florida's sentencing scheme carries a presumption of death upon the finding of a single aggravating factor.

IN THE NAME AND BY THE AUTHORITY OF THE (CF) (LF)

STATE OF FLORIDA

In the Circuit Court of the Seventeenth Judicial Circuit

of the State of Florida

For Broward County, at the SPRING 1986 Term thereof, on the 9th day of October, in the year of our Lord One Thousand Nine Hundred and Eighty-Six, to-wit: The Grand Jurors of the State of Florida, inquiring in and for the County of Broward, State of Florida, upon their oaths do present that

COUNT I

DENNIS SOCHOR

on the 1st day of January, in the year of our Lord One Thousand Nine Hundred and Eighty-Two, in the County of Broward, State of Florida, did then and there unlawfully and feloniously and from a premeditated design to effect the death of a human being, PATRICIA MARIE GIFFORD, did kill and murder the said PATRICIA MARIE GIFFORD, by asphyxiation, against the form of the statute in such case pursuant to Section 782.04(1) of the Florida Statutes, and

COUNT II

that DENNIS SOCHOR on the 1st day of January, in the year of our Lord One Thousand Nine Hundred and Eighty-Two, in the County of Broward, State of Florida, did unlawfully and forcibly, secretly, or by threat, confine, abduct or imprison PATRICIA MARIE GIFFORD against her will and without lawful authority with intent to commit or facilitate commission of a felony, to-wit: sexual battery,

against the form of the statute in such case pursuant to Section 787.01 of the Florida Statutes, made and provided to the evil example of all others in the like case offending, and against the peace and dignity of the State of Florida.

A TRUE BILL:

FOREMAN

I HEREBY CERTIFY that I have advised the Grand Jury returning the Indictment as authorized and required by law.

1143

Assistant State Attorney for the Seventeenth Judicial Circuit of the State of Florida, Prosecuting for said State. #29

APP. B

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT BROWARD COUNTY, FLORIDA

CASE NO: 86-15270 CF

JUDGE: RUSSELL E. SEAY, JR.

STATE OF FLORIDA,

Plaintiff,

vs.

DENNIS SOCHOR,

Defendant.

SENTENCE ORDER

The Defendant, Dennis Sochor, was indicted on October 9, 1986 for the crimes of Murder In The First Degree in Count I and Kidnapping in Count II of the Indictment.

The case was tried before a duly empaneled jury commencing on October 13, 1987 and concluding on October 20, 1987. The jury, having heard the evidence and the law instructed by the Court, concluded the guilt phase of the trial by finding the Defendant guilty of First Degree Murder and of Kidnapping as charged in the Indictment.

On October 21, 1987, a separate proceeding on the issue of penalty was conducted before the same trial jury as mandated by the provisions of Florida Statutes 921.141(1). After hearing further testimony, argument of counsel, instructions by the Court, and due deliberations, the jury returned an advisory sentence of death by a vote of ten (10) to two (2).

Pursuant to the provisions of Florida Statute 921.141(3), the Court hereby makes the following findings of fact:

AGGRAVATING CIRCUMSTANCES

1. The Court finds, according to Florida Statute 921.141(5)(b), that the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to another person. The Defendant was arrested on March 14, 1980 for Sexual Battery and Kidnapping. In State of Florida vs. Dennis Paul Grant, Case #80-2497-CF, the Defendant, Dennis Sochor, using the alias of Dennis Paul Grant, pled to Sexual Battery and was sentenced on September 30, 1980.

1231

Filed In Open Court,
ROBERT E. LOCKWOOD,
CLERK
ON NOV 02 1987
BY Deborah Berry

APP. C

2. The Court finds, according to Florida Statute 921.141(5)(d), that the crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit any Sexual Battery or Kidnapping. The jury convicted the Defendant of Kidnapping in Count II of the Indictment. There is sufficient evidence to prove the victim was taken from the Banana Boat and at some point held against her will. She was forcibly dragged out of the truck as she resisted and pleaded for help. As to the attempt to commit Sexual Battery, the Defendant, from his own statements to law enforcement officers, indicated he wanted sex and when the victim refused him he became angry and the fight ensued. The Defendant said he had these urges for sex. Even though there is no evidence the Defendant actually sexually assaulted the victim as the body was never found, the Defendant's admissions prove the death occurred as he was attempting to sexually assault her. The Court finds that both of these felonies were committed or attempted to be committed but the Court considers this as only one aggravating circumstance.

3. The Court finds, according to Florida Statute 921.141(5)(h), that the capital felony was especially heinous, atrocious or cruel. The evidence indicated that the victim was forcibly removed from the truck while she pleaded for help and even begged for her life. Even though Patricia Gifford's body was never recovered and no one knows how badly she was beaten, the Defendant admitted in his statements that as he choked her she resisted and fought him. There were several fingernail marks on his face which substantiates that a violent struggle ensued as confirmed by the Defendant's statements to the police officers. Dr. Wright testified that asphyxiation is a slow and painful death. Fear and emotional trauma preceeding the victim's

death may be considered as contributing to the heinous nature of the capital felony. It is clear there was fear and definitely emotional trauma before her death.

4. The Court finds, according to Florida Statute 921.141(5)(i), that the crime for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The evidence indicated that the Defendant pulled the victim out of the pickup at night along an abandoned road and proceeded to strangle her. He disposed of the body so it could never be found. The Defendant had previously been put on probation for Sexual Battery and knew the consequences if the victim survived and notified the Police Department. There is no question that it was committed in a cold and calculating manner as the Defendant told a witness who testified that he had choked someone to death in Fort Lauderdale, Florida and how easy it was to do. Furthermore, a cellmate testified that the Defendant had stated he had "killed the fucking slut bitch". There is no pretense of moral or legal justification.

MITIGATING CIRCUMSTANCES

1. The Defendant has no significant history of prior criminal activity. This mitigating circumstance does not apply. To the contrary, the Defendant has a most significant history of prior criminal activity. The Defendant admitted he had committed a rape in Michigan which case is still pending. According to the Doctors' reports introduced in evidence and all of the testimony, it indicates a very significant history of criminal activity.

2. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. This mitigating circumstance does not apply. The doctors who testified all found the Defendant competent and that he did not meet the criteria for involuntary hospitalization pursuant to the Baker Act. However, he was diagnosed as extremely dangerous and violent. Even though the Defendant claimed to the doctors he could not remember what happened, the Court finds as Dr. Castillo testified that the Defendant suffered from "selective amnesia" and attempted to mislead the doctors as to his recollections of the murderous incident.

3. The victim was a participant in the Defendant's conduct or consented to the act. This mitigating circumstance does not apply. The victim, Patricia Gifford, was a helpless and fearful 18 year old girl and in no way consented to this act.

4. The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. This mitigating circumstance does not apply. All the evidence indicated that, even though the Defendant's brother was there, he attempted to stop the Defendant from committing this brutal murder.

5. The Defendant acted under extreme duress or under the substantial domination of another person. This mitigating circumstance does not apply.

6. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. This mitigating circumstance does not apply. All the credible evidence indicates that the Defendant was able to appreciate the criminality of his conduct and was able to conform his conduct to the requirements of law

if he so desired. He told a witness who testified during the trial, that he had choked someone in Fort Lauderdale, Florida and it was so easy that he could do it again. Even though the Defendant maintained he was intoxicated during the crime, the testimony from all the witnesses showed, though he may have had some alcoholic drinks, he was still in control of his actions and behavior and knew what was happening. His ex wife testified that he acted violently even when he was not under the influence of alcohol.

7. The age of the Defendant at the time of the crime. This mitigating circumstance does not apply. The Defendant's birth date is February 25, 1952 and at the time of the crime he was twenty-nine (29) years old.

8. Any other aspect of the Defendant's character or record and any other circumstance of the offense. There were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory "mitigating" circumstances.

In Summary, it is the conclusion of the Court, after carefully and conscientiously weighing the aggravating and mitigating circumstances, that there are sufficient aggravating circumstances to justify and warrant the imposition of the death penalty and that there are no mitigating circumstances to outweigh the aggravating circumstances. It is, therefore,

THE SENTENCE OF THIS COURT that you, Dennis Sochor, be sentenced to death for the murder of Patricia Gifford.

It is further ordered that you, Dennis Sochor, be taken by the proper authorities to the Florida State Prison and be kept in close confinement until the day of your execution and that on that day you be put to death by electrocution, which is the manner prescribed by law, and may God have mercy on your soul.

You, Dennis Sochor, are hereby notified that the judgment of conviction and the sentence of death are subject to automatic review by the Supreme Court of Florida. You are further advised that you have the right to the assistance of counsel in the filing and preparation of your appeal. If you cannot afford your own attorney, you should advise the Court and an attorney will be appointed for you.

DONE AND ORDERED in open court, Broward County Courthouse, Fort Lauderdale, Florida, this 2 day of November, 1987.

Russell E. Seay

HONORABLE RUSSELL E. SEAY, JR.
Circuit Court Judge

ORIGINAL

Supreme Court, U.S.
FILED
OCT 15 1991
OFFICE OF THE CLERK

CASE NO. 91-5843

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

DENNIS SOCHOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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OCT 16 1991
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SUPREME COURT, U.S.

QUESTIONS PRESENTED

WHETHER THE TRIAL COURT AND THE FLORIDA SUPREME COURT CONSIDERED THE MITIGATING EVIDENCE PRESENTED.

WHETHER PETITIONER'S SENTENCE WAS SUBJECTED TO A PROPER HARMLESS ERROR ANALYSIS SUBSEQUENT TO INVALIDATION OF ONE OF FOUR AGGRAVATING FACTORS.

WHETHER PETITIONER'S CHALLENGE TO AN INSTRUCTION ON KIDNAPPING IS SUBJECT TO REVIEW BY THIS COURT IRRESPECTIVE OF THE PROCEDURAL DEFAULT FOUND TO EXIST BY THE FLORIDA SUPREME COURT.

WHETHER FLORIDA COURT'S APPLICATION OF THE AGGRAVATING FACTOR OF "HEINOUS ATROCIOIUS AND CRUEL" IS CONSTITUTIONAL ON ITS FACT AND AS APPLIED.

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OPINION BELOW

The opinion below has been reported as Sochor v. State, 580 So.2d 595 (Fla. 1991).

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts as accurate petitioner's statement regarding the applicable constitutional provisions involved.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. Section 1257 (3).

STATEMENT OF THE CASE

The Florida Supreme Court rendered its decision on May 2, 1991. A motion for rehearing was denied on June 18, 1991. Petitioner is seeking certiorari review in this Court.

STATEMENT OF THE FACTS

For purposes of the argument below, respondent would rely on and incorporate by reference the facts as articulated by the Florida Supreme Court in its direct appeal opinion.

REASONS FOR DENYING THE WRIT

POINT I

THE FLORIDA COURTS CONSIDERED ALL THE MITIGATING EVIDENCE PRESENTED AND GAVE IT THE WEIGHT DEEMED APPROPRIATE

Petitioner claims that his death sentence is a violation of the Eighth Amendment of the United States Constitution. Specifically he challenges how the trial court and the Supreme Court considered the mitigating evidence presented. He claims that the Florida courts failed to consider both the statutory and nonstatutory mitigating evidence that was presented at sentencing.

Petitioner has failed to establish any constitutional violation. The record belies petitioner's claim that the state courts did not consider the mitigating evidence presented. In the sentencing order, under the heading regarding nonstatutory mitigating evidence, the trial judge stated that he considered the testimony of the various family members. (R. 1235, petitioner's Exhibit C). He concluded that the evidence did not rise to the level of nonstatutory mitigating evidence. (R. 1235). The Florida Supreme Court upheld that finding. Sochor v. State, 580 So.2d 595, 604 (Fla. 1991). As such petitioner's allegation that the courts did not consider the evidence presented is without merit. Parker v. Dugger, 498 U.S. __, 112 L.Ed.2d 812, 821-822, 111 S.Ct. ___ (1991).

Furthermore as this Court has previously stated, a sentencer cannot refuse to consider relevant mitigating evidence, however, the weight to be given such evidence is within the sentencer's discretion. Eddings v. Oklahoma, 455 U.S. 104, 114, 71 L.Ed.2d 1, 11, 102 S.Ct. 869 (1982).

Also without merit is petitioner's claim that the Florida courts failed to weigh the statutory mitigating evidence. The trial court's order specifies what evidence was considered in determining the existence vel non of statutory mitigating evidence. (R. 1233-1235, petitioner's Exhibit C). The Florida Supreme Court also reviewed the evidence and likewise concluded that the mitigating evidence had not been established. Sochor, 580 So.2d at 604. Contrary to petitioner's assertions otherwise, the evidence presented in mitigation was not unrebutted. Doctors Livingston and Catillio testified that petitioner was either untruthful during his examination or that he had selective amnesia. (R. 718, 734,315). Although he claims that he had an alcoholic blackout the night of tne murder, he has given a detailed account of the night's events as well. (R. 736). Another psychologist testified that even if petitioner was intoxicated that night, he still would know that what he did was wrong. (R. 688).

Petitioner has failed to establish any constitutional violation. As stated by this Court on previous occasions, "It is not our role to reexamine the trial court's finding of fact, which have been affirmed by the Florida Supreme Court." Lewis v.

Jeffers, 497 U.S. __, 111 L.Ed.2d 606, 623, 110 S.Ct. __ (1990) citing to Barclay v. Florida, 463 U.S. 939, 968, 77 L.Ed.2d 1134, 103 S.Ct. 3418 (1983)(Stevens, J., concurring in judgment); Lewis, 111 L.Ed. 2d at 616-617; Walton v. Arizona, 497 U.S. ___, 111 L.Ed.2d 511, 524 110 S.Ct. ___ (1990).

Next petitioner makes a general attack against the Florida courts treatment of mitigating evidence. He claims that the Florida Supreme Court does not conduct its review in a rational and consistent manner. Petitioner further opines that the Supreme Court is inconsistent in attempts to "regularize" consideration of mitigating evidence. Petitioner's invitation to this Court, to conduct a de novo case-by-case comparison of the facts of other cases with the facts of the instant case has already been declined. Jeffers, 111 L.Ed.2d at 622.

Petitioner received an individualized sentencing determination as constitutionally required. Parker v. Dugger, 498 U.S. __, 112 L.Ed.2d 812, 826, 111 S.Ct. __ (1991) quoting Zant v. Stephens, 462 U.S. 862, 879, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983). This Court should deny review.

POINT II

PETITIONER'S SENTENCE RECEIVED PROPER APPELLATE REVIEW SUBSEQUENT TO THE INVALIDATION OF AN AGGRAVATING FACTOR

Petitioner claims that the Florida Supreme Court did not conduct a harmless error analysis once it vacated the aggravating factor of "cold, calculated and premeditated". Rather than substantiate this allegation with any relevant facts from the instant case, petitioner compares this case to other capital cases. Such an analysis does not demonstrate constitutional error. Lewis v. Jeffers, 497 U.S. __, 111 L.Ed.2d 606, 622, 110 S.Ct. __ (1990).

This Court has recognized that the Florida Supreme Court conducts a harmless error analysis when an aggravating factor has been vacated. Parker v. Dugger, 498 U.S. __, 112 L.Ed.2d 812, 111 S.Ct. __ (1991). This Court has also stated that a primary concern in sentencing under the Eighth Amendment is that the sentence should be based on the facts and circumstances of the defendant, his background, and his crime. Clemons v. Mississippi, 494 U.S. __, 108 L.Ed.2d 725, 738, 110 S.Ct. __ (1990).

The Florida Supreme Court approved the trial court's findings that no statutory mitigating evidence existed. It also approved the trial court's finding that nonstatutory mitigating evidence was entitled to little weight. Sochor v. State, 580 So.2d 595, 604 (Fla. 1991). Given the fact that three aggravating factors still existed irrespective of the absence of

one factor, along with the fact that there was nothing in mitigation, resentencing was not required. Sochor. Furthermore, although irrelevant to this Court's concern, the Florida Supreme Court further found that petitioner's death sentence was proportionate to his crime. Id; Pulley v. Harris, 465 U.S. 37 (1984).

Under Clemons and Parker the Florida Supreme Court conducted a proper harmless error analysis. Petitioner's dissatisfaction with the Florida Supreme Court's findings does not amount to any constitutional violation. Jeffers, 111 L.Ed.2d at 622. Since petitioner has failed to demonstrate that any constitutional violation occurred, review must be denied.

POINT III

PETITIONER'S CHALLENGE TO A JURY INSTRUCTION ON KIDNAPPING IS PRECLUDED FROM FEDERAL REVIEW AS THE FLORIDA SUPREME COURT DETERMINED THAT ISSUE WAS NOT PRESERVED FOR REVIEW ON DIRECT APPEAL

Petitioner claims that one of the jury instructions read to the jury was done so in error because he was not charged with the crime applicable to the instruction. Petitioner alleges that he was denied due process since he was convicted of a crime for which he was never charged. Petitioner has failed to mention that this claim was precluded from review in state court since there was never any objection at trial to the instruction given. Sochor v. State, 580 So.2d 595, 601 f.n.8 (Fla. 1991). Nor has petitioner established the requisite cause and prejudice to overcome his procedural default. As such review is precluded. Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969); Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783, 102 S.Ct. 1558, reh. denied (US) 73 L.Ed. 1296, 102 S.Ct. 2286 and reh. denied (U.S.) 73 L.Ed.2d 1361, 102 S.Ct. 2976 (1982); Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977).

Petitioner has failed to demonstrate any constitutional error. Petitioner was charged with kidnapping with the intent to commit or facilitate commission of any felony. Section 787.01 (1)(a)(2), Florida Statutes. The specific felony relied upon was sexual battery. The instruction however, encompassed Sections 787.01 (1) (a) (2) and (3). Section (3)

requires proof that the kidnapping was committed with the intent to inflict bodily harm or to terrorize the victim. No objection was made to the instruction. It was clear that the state was relying upon the evidence that petitioner kidnapped the victim in order to commit a sexual battery upon her. All the evidence presented and argument made by the prosecution demonstrated that the state was relying on that single theory. There was sufficient evidence to establish that charge. Sochor, 580 So.2d at 599-600. The allegation that petitioner was convicted under 787.01 (1)(a)(3) is mere speculation without any record support. Furthermore unlike the cases relied upon by petitioner, Dunn v. United States, 442 U.S. (1979) and Cole v. Arkansas, 333 U.S. 196 (1948) there was no variance between the evidence alleged in the indictment and the evidence produced at trial. Petitioner's attempt to commit a sexual battery upon the victim is certainly sufficient evidence of an attempt to commit bodily harm upon or terrorize the victim. Sochor.

Likewise without merit is petitioner's claim that the state proceeded under uncharged theories involving felony murder. The jury was clearly instructed that the underlying felonies regarding the felony murder doctrine were either kidnapping or sexual battery. Petitioner never requested that the state elect which theory it was proceeding under, i.e., premeditated or felony murder. Furthermore there is no state or federal constitutional requirement to do so. Schad v. Arizona, 501 U.S. __, 115 L.Ed.2d 555, 111 S.Ct. __ (1991).

Petitioner has failed to overcome his procedural default or failed to establish any constitutional violation to warrant review by this Court.

POINT IV

FLORIDA COURTS APPLICATION OF THE AGGRAVATING FACTOR OF "HEINOUS ATROCIOUS AND CRUEL" IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO PETITIONER'S SENTENCE

Petitioner claims that Florida's application of the "heinous atrocious and cruel" aggravating factor is unconstitutional irrespective of this Court's approval of same in Proffitt v. Florida, 428 U.S. 242 (1976). Specifically petitioner attacks the constitutionality of the instruction given in the instant case as well as its application by the trial court and subsequent approval by the Florida Supreme Court. Petitioner has failed to establish any constitutional error, consequently review must be denied.

Florida's application of the "HAC" factor has withstood constitutional scrutiny. Proffitt. This Court reiterated that finding recently in Lewis v. Jeffers, 497 U.S. __, 111 L.Ed.2d 606, 619, 110 S.Ct. __ (1990) and Walton v. Arizona, 497 U.S. __, 111 L.Ed.2d 511,529, 110 S.Ct. __ (1990). The trial court made explicit factual findings which were upheld by the Florida Supreme Court. (R. 1233-1235, petitioner's Exhibit C). Sochor, 580 So.2d at 603. There is no constitutional infirmity in the application of this aggravating factor to the facts of the case sub judice. Furthermore this Court again should decline an invitation to conduct a de novo case-by-case comparison of other Florida cases with the facts of the instant case. Lewis V. Jeffers, 497 U.S. __, 111 L.Ed.2d 606, 622, 110 S.Ct. __ (1990).

CONCLUSION

WHEREFORE, based on the forgoing facts and relevant case law, respondent respectfully requests that this Court DENY petitioner's request for certiorari review.

NO. 91-5843

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

DENNIS SOCHOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, Joan Fowler, a member of the Bar of this Court, hereby certify that on this 15th day of October, 1991, a copy of the Petition for Writ of Certiorari in the above-entitled case was furnished by courier to: GARY CALDWELL, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, counsel for the petitioner herein. I further certify that all parties required to be served have been served.

Joan Fowler

JOAN FOWLER
Assistant Attorney General
Department of Legal Affairs
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

Counsel of Record

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Case No.:

DENNIS SOCHOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW the Petitioner, Dennis Sochor, and moves this Court, pursuant to Rule 39.1, Rules of the Supreme Court, to declare him indigent and allow him to proceed in forma pauperis in this cause, in particular to waive any filing fees. As grounds therefore, Petitioner says:

1. Petitioner applies for a writ of certiorari to review the decision of the Supreme Court of Florida affirming his convictions and sentences for the offenses of first degree murder and kidnapping.

2. Petitioner was declared indigent in the state trial court and on his appeal to the state supreme court.

3. Petitioner has been incarcerated since his arrest in 1986 and has been indigent for all court proceedings since that time.

Supreme Court, U.S.
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4. Petitioner swears he is now indigent and without funds to pay any fees or costs in this action. Appendix A.

5. Federal statute requires all courts of the United States to allow commencement and prosecution of any suit without prepayment of fees or costs upon the showing made above. 28 U.S.C. §1915(a).

6. Refusal to allow petitioner to proceed in forma pauperis would deny him equal protection of the law, meaningful access to the courts, and due process of law since he cannot otherwise get the review to which a more affluent defendant would be entitled. See Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1029 (1959) (fees should be waived for discretionary appeal by indigent); Smith v. Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961) (fees should be waived for indigent prisoner seeking state habeas relief).

WHREFORE, Petitioner moves this Court declare him indigent and allow filing and prosecution of this petition without payment of any fees or costs.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Gary Caldwell, Esq.
Assistant Public Defender
Capital Crimes Division

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Case No.:

DENNIS SOCHOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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SUPREME COURT U.S.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS.

I, DENNIS SOCHOR, being first duly sworn, depose and say:

1. I am the Petitioner in the above-styled cause.

2. In support of my Motion For Leave to Proceed In Forma Pauperis and waive any fees or costs therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present in the petition for certiorari are:

1. Did the Florida trial and appellate courts violate the Eighth and Fourteenth Amendments by giving no weight to the mitigating evidence in imposing and reviewing petitioner's death sentence?

2. Did the Florida Supreme Court's review of petitioner's death sentence violate the Eighth and Fourteenth Amendments where that court upheld the sentence even though the trial court had instructed the jury on, and had applied, an improper aggravating circumstance, where the Florida Supreme Court did not reweigh the evidence or conduct a harmless error analysis as to the effect of improper use of the circumstance on the jury's penalty verdict?

3. In a capital case, does an instruction on an uncharged theory of guilt violate the Fifth, Sixth, Eighth, or Fourteenth Amendments?

4. Did the application of Florida's "especially heinous, atrocious or cruel" aggravating circumstance at bar violate the Eighth and Fourteenth Amendments?

3. I further swear that the following statements relating to my ability to pay the cost of prosecuting the petition are true:

a. I am not now employed and have not been employed since my incarceration began in 1986.

b. In the past twelve months, I have not received any income from any form of business, profession, or employment, rent, dividends, interest, or any such source.

c. I have no savings or checking accounts except a prison inmate account. The current balance of that account is $ 45.00 .

d. I own no real estate, stocks, bonds, notes, automobiles, or any other valuable property.

e. No people are dependent on me for support.

3. I understand that a false statement in this affidavit will subject me to penalties for perjury.

Dennis Sochor

Dennis Sochor

SUBSCRIBED AND SWORN To before me this 5th day of September, 1991.

Susan Cary

NOTARY

My commission expires:

NOTARY PUBLIC UNDERWRITERS

Supreme Court, U.S.
FILED
DEC 26 1991
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No. 91-5843

In The

Supreme Court of the United States

October Term, 1991

DENNIS SOCHOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari
To The Florida Supreme Court

JOINT APPENDIX
VOLUME I

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Petition For Certiorari Filed September 16, 1991
Certiorari Granted November 18, 1991

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RELEVANT DOCKET ENTRIES

Indictment.	October 9, 1986
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Imposition of sentence.	November 2, 1987
Notice of appeal.	November 3, 1987
Decision of Florida Supreme Court.	May 2, 1991
Order denying rehearing.	June 18, 1991

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA

In the Circuit Court of the Seventeenth Judicial Circuit of the State of Florida

For Broward County, at the SPRING 1986 Term thereof, on the 9th day of October, in the year of our Lord One Thousand Nine Hundred and Eighty-Six, to wit: The Grand Jurors of the State of Florida, inquiring in and for the County of Broward, State of Florida, upon their oaths do present that

COUNT I

DENNIS SOCHOR

on the 1st day of January, in the year of our Lord One Thousand Nine Hundred and Eighty-Two, in the County of Broward, State of Florida, did then and there unlawfully and feloniously and from a premeditated design to effect the death of a human being, PATRICIA MARIE GIFFORD, did kill and murder the said PATRICIA MARIE GIFFORD, by asphyxiation, against the form of the statute in such case pursuant to Section 782.04(1) of the Florida Statutes and

COUNT II

that DENNIS SOCHOR on the 1st day of January, in the year of our Lord One Thousand Nine Hundred and Eighty-Two, in the County of Broward, State of Florida,

did unlawfully and forcibly, secretly, or by threat, confine, abduct or imprison PATRICIA MARIE GIFFORD against her will and without lawful authority with intent to commit or facilitate commission of a felony, to-wit: sexual battery,

against the form of the statute in such case pursuant to Section 787.01 of the Florida Statutes, made and provided to the evil example of all others in the like case offending, and against the peace and dignity of the State of Florida.

A TRUE BILL:

/s/ John J. Flynn
FOREMAN

I HEREBY CERTIFY that I have advised the Grand Jury returning the Indictment as authorized and required by law.

/s/ (illegible)
Assistant State Attorney for the Seventeenth Judicial Circuit of the State of Florida, Prosecuting for said State.

IN THE CIRCUIT COURT OF
THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD
COUNTY, FLORIDA

THE STATE OF FLORIDA,) Case No. 86-15270CF

vs.) Judge: SEAY

DENNIS SOCHOR,)

Defendant.)

_____)

MOTION FOR STATEMENT OF AGGRAVATING CIRCUMSTANCES

The Defendant, Dennis Sochor, by and through the undersigned attorney, moves this Court to order the State to provide the Defendant with the precise grounds on which the State seeks the death penalty in this case.

A. No notification of particular statutory aggravating circumstances which the State would seek to establish was contained in the Indictment charging the Defendant.

B. No notice has been given as to what specific aggravating circumstances this Court or the State intend to consider.

C. Absent the notification of aggravating circumstances, the use of these aggravating circumstances to sentence the Defendant to die would violate the Accusation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 15 (a) of the Constitution of the State of Florida.

D. Utilization of aggravating circumstances not contained in the Indictment or in any subsequent form of notice deprives the Defendant of essential safeguards "designed to limit the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible." *Provence v. State*, 337 So.2d 783 (Fla. 1976).

E. Failure to give timely and adequate notice of the precise grounds on which the State seeks the death penalty, or on which the Court would consider imposing the death penalty, deprives the Defendant of a fair sentencing hearing, with the Defendant being given a meaningful opportunity to rebut the aggravating circumstances. Thus, the Defendant is faced with the posture of having his Sixth Amendment Right to Effective Assistance of Counsel thwarted.

Without notice, the Defendant or his counsel are unable to prepare and present any defensive evidence and arguments to meet the State's contentions as to what is an aggravated circumstance and the issues which the Court may regard as controlling on the question of life or death.

F. Florida Standard Jury Instructions in criminal cases deal with instructions in capital cases. The instruction on p. 76 instruct the jury to consider the evidence already heard at trial. Therefore, the only way to confront and rebut aggravating circumstances during the course of the guilt phase trial is to give the Defendant and his counsel notice thereof in advance.

G. Proper and advance notification of all aggravating circumstances is essential to permit the Defendant

through counsel to effectively deal with the allegations during trial.

H. The Florida Supreme Court in *Barclay* and *Dougan v. State*, 362 So.2d 657 (Fla. 1978) vacated the death penalty and remanded the cause for a new Sentencing Hearing since it was essential to permit Defense Counsel to have access to all information and sufficient time to rebut in a meaningful manner.

This decision is consistent with the U.S. Supreme Court's decision in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1107 (1977). There the Court said at page 1205 that "it is now clear that the sentencing process as well as the trial itself must satisfy the requirements of the Due Process Clause."

> . . . "Our belief that debate between adversaries is often essential to the truth-seeking function of trials require us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases."

Thus a denial of aggravating circumstances violates the Due Process Clause as interpreted in *Gardner*.

I. The U.S. Surpeme [sic] Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, (1976) upheld the constitutionality of the Georgia Death Law. The Georgia Law requires as shown at p. 2920 of *Gregg*:

> "the judge (or jury) shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the

> absence of any prior conviction and pleas: *Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible.* The judge (or jury) shall also hear argument by defendant or his counsel and the prosecuting attorney. . . . regarding the punishment to be imposed. S27-2503. (Supp. 1975): (underlining added.)

This provision of the Georgia Statute as approved by the Supreme Court is essential to effectuate the aforementioned constitutional safeguards.

WHEREFORE, the Defendant requests this Court to order the State to file a notification declaring what statutory aggravating grounds the State intends to prove to sustain the request for death. Also, the Defendant requests this Court to inform the Defendant of what aggravating grounds this Court would consider to impose the penalty of death.

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Statement of Aggravating Circumstances has been furnished by hand to the Office of the State Attorney, Broward County Courthouse, Fort Lauderdale, Florida, this 13 day of November 1986.

Respectfully submitted,

ALAN H. SCHREIBER
Public Defender
17th Judicial Circuit

/s/ TG
Thomas Gallagher
Assistant Public Defender
Attorney for Defendant

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

Case No. 86-15270CF

Judge: SEAY

(Caption Omitted in Printing)

MOTION TO DECLARE SECTION 921.141, FLORIDA STATUTES UNCONSTITUTIONAL RE: AGGRAVATING AND MITIGATING CIRCUMSTANCES

COMES NOW the Defendant, Dennis Sochor, by and through the undersigned attorney, moves this Honorable Court to dismiss the indictment herein and to declare Florida Statute 921.141 unconstitutional. As grounds, the defendant states the following:

1. Florida Statute 921.141 is unconstitutional on its face in that it is violative of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 9 and 17 of the Constitution of the State of Florida. In support of this allegation the defendant would state:

A) The aggravating and mitigating circumstances as enumerated in Florida Statute 921.141 are impermissibly vague and overbroad.

The first aggravating circumstance listed is that the capital felony was committed by a person under sentence of imprisonment. This circumstance is overbroad in that it makes no distinction between a person imprisoned for a non-violent crime and one imprisoned for a violent crime.

Aggravating circumstance (b) relating to the previous conviction of another capital felony or a felony involving the use or threat of violence also suffers from overbreadth in that the circumstance surrounding the prior felony is not considered.

Aggravating circumstance (c) involving the knowing creation of a *great* risk to many persons is irrefutably vague simply due to its qualifying adjectives. Furthermore, although the intent of the Legislature was to direct this circumstances [sic] toward hijacking and bombings, this circumstances [sic] has been applied so broadly as to encompass almost any homicide.

Aggravating circumstance (d) involves felony murder, This particular circumstance is factually overbroad in that a capital felony committed during the enumerated felonies has an *automatic* aggravating circumstances [sic] and, therefore, carries with it a presumption of death without regard to the individual facts surrounding each case. Consideration of this aggravating circumstance could lead to a sentence of death which is totally disproportionate to the Defendant's conduct. "A punishment is excessive and unconstitutional if it is grossly out of proportion to the severity if the crime." *Coker v. Georgia*, 97 S.Ct. 2861 (1977). Pursuant to this circumstance a "wheelman", whose co-defendant accidentally kills someone during the commission of an enumerated felony would presumptively and automatically be considered for a death sentence, while a cold-blooded pre-meditated murder could conceivably be exempt from any aggravating circumstance. The arbitrariness of this circumstance is then evident.

Aggravating circumstances (e) and (g) are vague and overbroad as to render consistent application impossible. Aggravating circumstances [sic] (e) relates to a capital felony committed to avoid lawful arrest or to effectuate an escape from custody and circumstance (g) involves the disruption of the lawful exercise of any governmental function or the enforcement of laws. Examination of recent cases reveals that the silencing of a witness has been considered as giving rise to aggravating circumstances (e) and (g), *Meeks v. State*, 336 So.2d 1142 (Fla. 1976), as giving rise only to circumstance (e) *Knight v. State*, 338 So.2d 201 (Fla. 1976), and as giving rise to no aggravating circumstance, *Gibson v. State*, 351 So.2d 948 (Fla. 1977).

Aggravating circumstances [sic] (h) applies where the capital felony is especially cruel, heinous or atrocious. Almost any capital felony would appear especially cruel, heinous and atrocious to the layman, particularly any felony murder. Examination of the widespread application of this circumstance indicates that reasonable and consistent application is impossible. This standard is vague and overbroad and provides no basis for distinguishing one factual situation from another. *Godfrey v. Georgia*, 446 U.S. 420 (1980).

The mitigating circumstances enumerated in the statute are vague and overbroad as well. The qualifying adjectives used to describe the circumstances unconstitutionally limit the mitigating factors to be considered and foster an arbitrary application.

B) Florida Statute 921.141 is also unconstitutional on its face in that it is violative of the mandate of the

United States Supreme Court as expressed in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2964 (1978), which requires that the defendant be allowed to present *all* evidence relevant to the mitigation of sentence.

Florida Statute 921.141 expressly limits applicable mitigating circumstances to those enumerated in sub-section (6). Sub-section (6) expressly states "mitigating circumstances *shall* be the following" (emphasis added). Sub-section (2) states "that the jury shall deliberate and render an advisory sentence to the court based on . . . (B) Whether sufficient mitigating circumstances exist as *enumerated* in sub-section (6) which outweigh the aggravating circumstances found to exist. (emphasis added).

Examination of the legislative history of §921.141 clearly shows that the intent of the legislature was to limit both aggravating and mitigating circumstances so as to avoid the purely discretionary and arbitrary sentencing standards condemned in *Furman v. Georgia*, 408 U.S. 238 (1972).

Just prior to Furman, the legislature had passed a new capital sentencing law permitting consideration of mitigating circumstances "including but not limited to" a list of factors enumerated in the statute. Laws of Florida, Chapter 72-72 (1972). The statute took effect on October 1, 1972, but was short lived as a result of *Furman*. The legislature determined that unguided discretion was precluded in the aftermath of *Furman* and therefore abandoned Chapter 72-72 in favor of the present Florida Statute 921.141.

Pursuant to the obvious intent of the legislature and the plain language of the statute, the Florida Supreme Court held in *Cooper v. State*, 336 So.2d 1133 (Fla. 1976):

> The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (172) [sic].
>
> The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist *as enumerated* in subsection (6); (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist . . . " (emphasis added). This limitation is repeated in Section 921.141 (3), governing the trial court's decision on the penalty. Both sections 921.141 (6) and 921.141 (7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under *Furman undisciplined* discretion is abhorrent whether operating for or against the death penalty.

The Court went on to say, "In any event the legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness

of a death penalty for the most aggravated and unmitigated of serious crimes, and *we are not free to expand* the list. *Cooper v. State, supra* at 1139 (emphasis added).

The Supreme Court of Florida, in response to *Lockett v. Ohio, supra*, attempted to retreat from the unqualified pronouncement expressed in *Cooper*. In *Songer v. State*, 365 So.2d 696 (Fla. 1979) the Supreme Court said that in *Cooper* it was concerned, not with whether evidence proffered in mitigation came within the enumerated mitigating factors, but rather with whether the proffered evidence was probative. The above excerpt from *Cooper* belies this position. Furthermore, whatever *Songer* means by "probative", any such qualifying limitation upon the presentment of evidence in mitigation conflicts with the mandate of the United States Supreme Court as expressed in *Lockett* and render §921.141 unconstitutional.

The continuing vitality of *Cooper* is evidence [sic] by the opinion filed in *Hargrave v. State*, 366 So.2d 1 (Fla. 1978), wherein the majority concluded that the defendant's psychological deficiencies did not provide "a sound basis for establishment of the statutory mitigating circumstances". *Id.* at 6.

The same legislative intent pervaded the Ohio deat [sic] penalty statute which limited defenant [sic] to statutorily enumerated mitigating circumstances. That limitation led the Court in *Lockett v. Ohio*, 438 U.S. 586 (1978) to hold the Ohio statute unconstitutional as violative of the Eighth and Fourteenth Amendments to the Constitution of the United States. Noting that the Ohio Legislature limited the mitigating circumstances in response to *Furman*, the plurality held:

There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commends [sic] of the Eighth and Fourteenth Amendments.

* * *

The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendment. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

Id. at 605, 607.

Quite clearly, the Florida Legislature has precluded consideration of relevant mitigating circumstances by limiting defendants to those circumstances listed in Section 921.141(6)(a)-(g). Obviously relevant mitigating circumstances such as prospects for rehabilitation, employment background, life sentences imposed in similar cases, lack of premeditation, familiar responsibility, military background and recognition of guilt, are not listed in the Florida death penalty statute.

Thus, the Florida death penalty statute suffers from the same constitutional infirmities as the Ohio statute.

WHEREFORE, the defendant requests the Court to declare Florida Statute Section 921.141 unconstitutional and invalid and vacate death as a possible punishment in this case.

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Declare Section 921.141, Florida Statutes, Unconstitutional Re: Aggravating and Mitigating Circumstances has been furnished by hand to the Office of the State Attorney, Broward County Courthouse, Fort Lauderdale, Florida, this 13 day of November 1986.

Respectfully submitted,

ALAN H. SCHREIBER
Public Defender
17th Judicial Circuit

/s/ TG
THOMAS GALLAGHER,
#127247
Assistant Public Defender
Attorney for Defendant

IN THE CIRCUIT COURT OF
THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD
COUNTY, FLORIDA

STATE OF FLORIDA,) Case No. 86-15270CF

vs.) Judge: SEAY

DENNIS SOCHOR,)

Defendant.)

_____)

DEMAND FOR DISCOVERY RELATIVE TO SENTENCING

The Defendant, Dennis Sochor, pursuant to Amendments Five, Six, and Fourteen to the Constitution of the United States, Article I, Sections Nine and Sixteen of the Constitution of the State of Florida, Rules 3.220 and 3.780 Fla.R.Crim.P., *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), *Woodson v. North Carolina*, 428 U.S. 242, 96 S.Ct. 2978, 49 L.Ed.2d 913 (1976), *Brady v. Maryland*, 373 U.S. 373 U.S. [sic] 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *United States v. Argurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) and specifically demands the following discovery material which may be relevant to the sentencing portion of the bifurcated trial envisioned by Section 921.141, Florida Statutes:

1. An enumerated list of the aggravating circumstances which the prosecution intends to attempt to prove during the sentencing phase;

2. The names and addresses of those persons whom the prosecution intends to call in an effort to prove those aggravating circumstances during the sentencing phase;

3. The statement of any person whose name is furnished in compliance with the preceding paragraph;

4. An enumerated list of any tangible papers, documents, photographs or objects which the prosecution intends to introduce in evidence during the sentencing phase;

5. The Defendant further demands that the prosecution disclose to the defense counsel any material information within the State's possession or control which tends to establish, or may lead to the discovery of evidence tending to establish, the existence of any of those "mitigating circumstances" set forth in Section 921.141 (6)(a) through (g) or any other fact or circumstances tending to mitigate culpability for the offense charged which is known to the State or its agents.

6. The above demanded information being relevant to an extremely critical stage of the proceedings it must be provided well in advance of trial of this cause in order that counsel for the Defendant might effectively make use of the mitigating evidence, comment upon, deny, explain rebut or present evidence challenging the accuracy and/or materiality of the identified alleged aggravating circumstances.

WHEREFORE, said Demand for Discovery Relative to Sentencing by the Defendant being relevant and material to the proper defense of the Defendant under applicable Rules, cases and constitutional provisions,

Defendant requests that this demand be answered in all respects.

I HEREBY CERTIFY that a true and correct copy of the foregoing Demand for Discovery Relative to Sentencing has been furnished by hand to the Office of the State Attorney, Broward County Courthouse, Fort Lauderdale, Florida, this 13th day of November, 1986.

ALAN H. SCHREIBER
Public Defender
17th Judicial Circuit
/s/ TG
THOMAS GALLAGHER,
Assistant Public Defender
Attorney for Defendant

State of Florida)
) SS: Russell E. Seay, Jr., J.
County of Broward)

IN THE CIRCUIT COURT
OF THE 17TH JUDICIAL CIRCUIT

(Caption Omitted In Printing)

* * *

[7] THE CLERK: Dennis Sochor.

THE COURT: Pending capital motions? Are they the usual motions?

MR. GALLAGHER: Standard motions, Your Honor. I do not have any argument on them because the Court has ruled on them before.

THE COURT: Anything changed recently?

MR. MORTON: Not to my knowledge, Judge.

THE COURT: But as far as the various motions, has anything changed up in the Supreme Court?

MR. MORTON: No.

THE COURT: Someone got reversed the other day, I think it was Coker. I think there was a question about them being able to impose the death penalty, but even if they didn't agree, so long as they can come back with a verdict it's all right. You cannot challenge them for cause anymore; right?

MR. MORTON: Just so long as they follow the law, Judge. It all boils down to that, regardless of any philosophical feelings about capital punishment.

THE COURT: All right. Do you have any affirmative questions right now?

MR. GALLAGHER: No, Your Honor, I do not.

[8] THE COURT: We have a trial date of what?

MR. GALLAGHER: The date is December 9th, Judge, and I will tell you now it's totally unrealistic, from my point of view. I have what is purported to be discovery, but I only received statements from some of the witnesses, not all. I have received no police reports. I think they have listed about 54 witnesses and about 15 of them are out of state.

THE COURT: How many witnesses?

MR. GALLAGHER: Fifty-four.

THE COURT: What are they going to say?

MR. MORTON: Judge, this case occurred or this girl disappeared a few years ago and the defendant was on the loose or on the run somewhere incognito until he was arrested in Georgia on a DUI charge and a fingerprint check led to him being a suspect in this case. He gave a confession. There are several witnesses he came in contact with and has made statements to in the course of the last 3 years, some in other states, and there are many other witnesses involved in this case, they have moved. So we are going to have to go out of state to depose witnesses.

THE COURT: I heard Ritarsick (phonetic) is [9] in Georgia now. What's he doing there?

MR. GALLAGHER: He retired, more or less, from the Sheriff's Department.

THE COURT: He's not that old.

MR. GALLAGHER: He just wanted to go fishing, I guess, Judge.

THE COURT: I don't know how people get the money to do that but okay. I know these were just ruled on the other day. You don't have to give the aggravating circumstances ahead of time; do you?

MR. MORTON: No, we don't.

THE COURT: That motion is denied. The motion to declare Florida Statute 921 unconstitutional is denied. The motion to dismiss is denied. Your motion to require the State to announce its position as to the death penalty is denied. I read a statement on that the other day about a case from Miami, I read something about that. Actually, the State will put on its case and if they get a conviction then you will go into the second phase.

MR. GALLAGHER: But the State knows ahead of time, Judge, if they are going to be requesting it.

[10] MR. MORTON: Maxwell versus State from '83 wherein the Court indicated we do not have a duty to provide that to the defendant, Your Honor.

THE COURT: Have you told him your position on that?

MR. MORTON: I will probably be asking for the death penalty, considering his background, Judge. That's as much as I can tell them right now.

THE COURT: All right. The demand for discovery relative to sentencing, that's premature.

MR. MORTON: No. I'm still opposed to it, under the law, and I'm not obligated to do so.

THE COURT: That's denied. He has indicated he will be seeking the death penalty.

MR. MORTON: And that's based on my understanding of this case and the defendant's background. It is a case where the jury might well consider the death penalty as a possibility, of course after hearing mitigating and aggravating circumstances. I'm not aware of any mitigating circumstances but I can definitely say there are aggravating circumstances which probably this Court and the jury should consider as far as the death penalty is concerned.

[11] THE COURT: All right. The demand for discovery relative to sentencing is denied. What is this one? You want to preclude what?

MR. MORTON: There are a lot of motions with respect to the jury system, Judge.

THE COURT: Yes, but besides we don't exclude them. So your motion to preclude their challenges for cause are denied. Another motion to dismiss, that's denied. The motion for the jury dispersal, that is denied. That has been covered or there is a recent opinion on that.

MR. GALLAGHER: Yes, Your Honor, There is opinions on most of them, if not all of them.

THE COURT: The motion to sequester the jury, there was a recent ruling on that and that is denied.

MR. GALLAGHER: I'm requesting individual voir dire, that is, that we speak to one juror at a time.

THE COURT: I see.

MR. GALLAGHER: In other words, sequester the jury and have them spoken to one at a time. That has been denied by all the other judges, that I know of.

THE COURT: Yes. It's denied. I have done [12] that before but only because it has something to do with contaminating the rest of the panel.

MR. GALLAGHER: Well, there has been pretrial publicity in this case, Your Honor.

THE COURT: Not that much. It's denied. Motion to declare Florida Statute 922.10 unconstitutional is denied. Motion to preclude sentencing pursuant to 921.141 is denied. Another motion to dismiss. I guess all of the motions to dismiss are denied.

Now here's your motion for individual voir dire and it is denied. A motion to prohibit jury dispersal, the law requires that they do remain together. Or, are you referring to just during deliberations?

MR. MORTON: Just during deliberations, Judge. During the trial they can still go home.

THE COURT: But once they get the case for deliberations then the jury must be sequestered.

MR. GALLAGHER: Yes, sir, if it goes beyond one day.

THE COURT: That's denied. Individual voir dire examination is denied. The motion to dismiss the Indictment or declare death not a possible penalty is denied. Motion to limit dismissal to [13] get qualifications of the jury is denied. That's it.

MR. GALLAGHER: Please the Court, Your Honor? At this time I would be requesting a confidential psychological evaluation under Rule 3.216 for me. If I submit an order to the Court will the Court have any objection to me filling in the name?

THE COURT: No. I have no objection. Whoever you want.

MR. GALLAGHER: I'll submit the order to the Court through the secretaries. Also, Judge, my client is requesting that I ask this Court for advice about his family. He has family coming down Saturday the 6th of December I believe from Michigan. They're coming down to see him, if in fact they will be granted a contact visit. I wonder whether the Court has any objection to signing an order for a contact visit for December 6th?

THE COURT: I don't have any objection but the jail plays games with us judges. First the jail said, "Don't do that," so as a result we stopped doing it now. Then the jail tells you people they will do it with a judge's order. The Sheriff has [14] full authority and he can do it if he wants to. He doesn't tell me how to run my courtroom and I don't tell him how to run the jail. But personally I don't care.

MR. GALLAGHER: If I submit an order will the Court sign it for Saturday the 6th of December?

THE COURT: Sure. Why not?

MR. GALLAGHER: Thank you, Your Honor. Also, Judge, this trial is set for December 9th and to be realistic I'm not going to be ready.

THE COURT: Do you want to set it over right now?

MR. MORTON: Yes, Judge.

THE COURT: Any date you have in mind?

MR. GALLAGHER: I don't know, Judge, because I have quite a bit of work.

THE COURT: Whose continuance is it going to be?

MR. MORTON: Judge, I have provided an Answer to his Demand for Discovery. I did not give him copies of everything that is now available to him, but I provided an Answer to his witness list and if he wants to take the position he has not yet received discovery because he doesn't have copies of that, my position would be we will make them [15] available to him. So I will at this time agree to a joint continuance.

MR. GALLAGHER: That's fine with me, Your Honor.

MR. MORTON: Because of the fact it might have been my secretary's fault. She may not have given him all of the police reports.

THE COURT: What kind of a date are you talking about? Late January or February or what?

MR. GALLAGHER: Could we set it for trail [sic] in February, Judge, and leave it at that and see where we are then?

THE COURT: All right. Get a hold of Pat and she will give you a date.

MR. GALLAGHER: The problem is, Judge, this case is going to necessitate a lot of travel.

MR. MORTON: So long as it's not February 2nd. I have a date certain then.

MR. GALLAGHER: I also have a trial set for a date certain on February 2nd myself before Judge Moe.

THE COURT: How about February 17th?

MR. MORTON: That's fine, Judge.

MR. GALLAGHER: That's fine, Your Honor.

(Thereupon, the hearing was concluded.)

IN THE CIRCUIT COURT
OF THE 17TH JUDICIAL CIRCUIT

(Caption Omitted In Printing)

* * *

DIRECT EXAMINATION

[305] THE CLERK: Please state your name and spell your last name.

THE WITNESS: Gary Charles Robert Sochor.

Q (By Mr. Hancock) And how old are you, Gary?

A Thirty-four.

Q And where do you presently live, sir?

A Iona, Michigan.

Q Who do you live there with?

A My wife and three children.

Q Do you have any children?

A Three.

[306] Q And what are their ages?

A Twelve, ten, and eight.

Q And what is your occupation right now? What do you do?

A I am working with a roofing company.

Q I take your attention back to December of 1982 and January of 1982. What were you doing, what type of work?

A I didn't hear the question.

Q That's okay. Back in December of 1981, what type of employment or occupation did you have?

A I worked for Oldsmobile.

Q And what did you do for Oldsmobile?

A I was a motor repairman.

Q How long did you work for Oldsmobile?

A At that time, approximately ten years.

Q Now, you know an individual by the name of Dennis Sochor; correct?

A Yes.

Q And what relationship is he to you?

A He is my brother.

Q And what is the age difference between you and your brother?

A A year and a day.

Q Now, did there come a time, in December of [307] 1981, that you had occasion to come to Fort Lauderdale?

A Yes.

Q And when would you have come, Gary?

A I believe it was the day after Christmas.

Q And who did you visit, while you were down here?

A My brother.

Q And where was your brother living?

A In an apartment, just off 84.

Q In Fort Lauderdale; correct?

A Yes.

Q And who was he living there with?

A Two brothers, Randy and Barry.

Q And I take your attention back to New Year's Eve, December 31, 1981. Did you have occasion to go out New Year's Eve?

A What was the date?

Q December 31st, New Year's Eve.

A Yes.

Q Who did you go out with?

A My brother.

Q And can you tell us what time you went out with your brother?

A We left the apartment at approximately six in the afternoon.

[308] Q And can you tell the ladies and gentlemen of the jury where you went, Gary?

A We went to the Banana Boat.

Q And where was the Banana Boat?

A On State Road 84.

Q Can you describe that bar for us, Gary, if you would, please?

A Well, it was a fairly good size bar with a bar in the outside of the building in the back, and a bar – two bars, one in towards the highway, and one towards the back, by the parking lot.

Q And where did you sit, or where did you go in there?

A When we first entered, we went to the bar in the back by the parking lot, and we sat at – I believe we went and sat at the bar.

Q Did you have anything to drink, before you got to the bar?

A No.

Q Did your brother have anything to drink, before he got to the bar?

A No.

Q And while you were in the bar, did there come a time when you had occasion to meet two young females?

[309] A While we were there, approximately a half hour or so, two girls came in.

Q Can you describe these two girls?

A Yeah, one had blond hair and glasses. I believe they both had glasses, and Patty was the blond haired girl.

Q Do you remember the name of the girl, the one girl –

A Patty was the blond, and Delta is a dark haired girl.

Q And how long did you talk to them for?

A Pardon?

Q How long did you talk to them for?

A Myself?

Q Yes.

A Approximately half an hour maybe.

Q And was there any reason why you didn't talk to them longer than that?

A They seemed fairly young. I come down for a vacation, and I was more interested in talking to older, more – what's the word?

Q More mature?

A More mature.

Q Let me show you State's Exhibit 5 and ask you if you recognize these two girls.

[310] A Yes.

Q Were those the two girls you and your brother met that evening?

A Yes.

Q And what did you do after you left the girls? Where did you go?

A I went into the bar, the inner bar.

Q What did your brother Dennis do?

A He stayed out in that bar talking to Patty and Delta.

Q And do you know how long he stayed out there talking to them for?

A While we were in the bar. We stayed at that bar most of the night, and he was out in the back with them the whole time we were there.

Q What were you doing?

A I was walking around the inner bar talking to a lot of people, celebrating the new year coming.

Q Did you ever go back and check with him?

A Periodically, I'd go through the door in the back and see how – you know, just look around the corner and see how they were doing.

Q Now, what type of vehicle did you come to the bar in, Gary?

A A little white truck.

[311] Q And whose white truck was that?

A My brother told me it was his boss' truck that he used in the pool cleaning business.

Q And where did you park, when you got there?

A Along the – I'm not familiar. I believe it was the south side of the building.

Q In the parking lot of the building?

A Yeah.

Q Looking at State's Exhibit 19 in evidence, do you recognize that?

A Everything but the dent. When I seen it, it didn't have any dents in it.

Q Same with State's Exhibit 17, does that look like the white –

A That looks like the truck.

Q Now, did there come a time when someone became sick in the bar?

A Yeah. I believe it was about the third time I went to the back. When I opened the door, Denny and Patty were helping Delta, what seemed to be she was pretty drunk, and they were helping her out to the vehicle, and I asked them if they wanted some help to take her out. They said yes, so I –

Q So, you assisted them?

[312] A Yes.

Q Let me take you back to the vehicle, one other question. Do you know when your brother last washed that vehicle or cleaned it?

A It was cleaned the whole time. The whole week I was down there, it was always clean.

Q What would he do everyday?

A During the day, he'd go clean the pools, but I know the truck was cleaned everyday, and the doors were always locked.

Q What happened now Gary, when you helped him with this girl that was sick out to the parking lot?

MR. RICH: Your Honor, I have an objection. When he says girl out to the parking lot, I'd like to know which girl it was.

MR. HANCOCK: I will be happy to rephrase it.

THE COURT: I though he stated.

Q (By Mr. Hancock) Looking at the State's Exhibit, which girl was it that was sick?

A Delta, the dark haired girl.

Q The one over here?

A Yes.

Q And where did you take her, or help take [313] her?

A We took her out to the car and put her in the passenger's seat and rolled the windows down a little bit and locked the doors.

Q What type of car was it that you took her to? Do you remember the color of the car?

A Seemed like a blue and white mustang or –

Q Then you went where?

A Then we went back – Dennis, Patty, and I went back to the bar, and they went to the table that they were at, and I went into the inner bar.

Q Then there came a time when you left the bar; is that correct?

A Yeah, it was after New Year's. They had celebrated the new year, and I hadn't met anybody that I really could talk to or no one in particular. I was pretty bored with the bar and wanted to leave and go somewhere else.

Q And can you tell us what happened then? There came a time when you left; right? You and your brother left?

A Yes, I went out and told Denny I wanted to get going, and he threw me the keys and told me to bring the truck around, and he'd be there.

[314] Q Did you go bring the truck around?

A Yeah. I got in the truck, and when I brought the truck around, it was like a horseshoe parking lot, and I brought it around, and Denny and Patty were in the back corner of the parking lot underneath a tree kissing.

Q Let me show you, with Judge Seay's permission, State's Exhibit One. Now, looking at State's Exhibit One – and you are not real familiar with Broward County, is that a fair statement?

A Yes, I am not.

Q Does this look like the Banana Boat?

A Yes.

Q Is that the Banana Boat?

A Yes.

Q Can you come down, with permission of the Judge, and show us where you pulled the pick-up to?

Maybe show this group, Gary, and then walk down.

A The truck was parked right here, and I brought it around this way, and their car was parked approximately right here, and then Denny and Patty were back there.

Q Thank you. You can sit down. Now, what did you do then, Gary, after you pulled the pick-up [315] around?

A I parked behind the vehicle Delta was in and waited.

Q Did you do anything?

A Well, I waited for ten, fifteen minutes, and I wanted to get going, so I backed up by the tree, honked the horn a couple of times, hollared at them, then I pulled forward again, behind the car.

Q What happened then?

A Well, Denny and Patty come up to the vehicle and kissed good-by, and Denny come over to the driver's

side and told me to get over, and I told him I wanted to drive. We argued for a couple of minutes over who was going to drive, and finally, I wanted to get going, so instead of arguing anymore, I just got out of the vehicle and walked around to the passenger's side.

Q Why did you give in?

A He forced the issue that he was going to drive. He wasn't going to let me drive. It was his boss' truck.

Q What happened then?

A Well, at that time, Patty was standing by the driver's side of the car, and I just mentioned that we ought to get something to eat because I always – [316] after drinking, I always usually went out for breakfast and told her that her girlfriend was – let her sober up, and we'd go out and get something to eat.

Q And what was the next thing that happened?

A She got in the vehicle, and we took off.

Q Approximately how far did you go, Gary?

A It seemed about approximately five minutes.

Q You were still in Broward County, Florida though; is that correct?

A Five minutes. I am not sure what, you know, where the countyline is.

Q What happened then?

A Everything.

Q Let me ask you this, before I ask that. Who was driving?

A Denny was driving.

Q And where were you?

A I was in the passenger's seat.

Q Did there come a time when the vehicle stopped?

A I remember the vehicle coming to a stop, and Denny got out of the truck and –

Q Now, do you remember a time when Patty said something to you?

[317] A Patty was hollaring [sic] for help, asking what was going on.

Q Who was she yelling to help her?

A Myself. I got out of the passenger's side, ran around the vehicle, and Denny had her on the ground, had her hands pinned down. I hollared [sic] at him, and –

Q What was she doing at that time, Patty?

A Just laying there, and I couldn't understand what was happening, and I just hollared [sic] at Denny to leave her alone. I went and picked up a stone, looking for a rock or stone or something, and I remember throwing – not to hit him. I threw the stone just above his head to scare him, and he turned and looked at me and told me to get back in the truck, which I did.

Q And why did you get back in the truck?

A Well, in our past, Denny would – we would get in brotherly arguments and fights, and sometimes Denny would get real furious and –

Q Let me ask you this: How did he look when you saw him out there? Describe him, if you would, to the ladies and gentlemen of the jury.

A I wouldn't know what come over him at times, but a couple of times in our past and at that [318] particular time –

Q Do you need a drink of water, Gary?

A Some air.

MR. HANCOCK: Can we get a drink of water for him?

Q (By Mr. Hancock) Just relax.

A The pupil would roll back, and all I'd see is white in his eyes, and he'd be very – real furious, and in a voice that wasn't his. It would be deep, and would scare you.

Q And can you describe this look?

A He looked to be possessed.

Q What do you mean by "he looked to be possessed?"

A Well, I don't know. It wasn't him. He was possessed by something, you know. I always looked at it as the devil.

Q Now, you indicated you had seen this look before; correct?

A Yes.

Q Now, after that, you indicated you got back in the truck; correct?

A Yes.

Q And after getting back in the truck, can you tell the ladies and gentlemen of the jury what you [319] did?

A I put my face in my hands, in my lap, and just sat there.

Q And how long was it before Dennis came back into the truck?

A It seemed to be around five minutes, a couple of minutes, not very long.

Q Did you ever see Patty again?

A No.

Q And what happened after he got back in the truck?

A As we started down the road – and it's not hard to remember, but it's just I can remember him starting to talk to me, and I started screaming because I didn't want to hear anything he had to say. I didn't look at him. I didn't sit up. I was just screaming.

Q And why didn't you make any effort to help Patty?

A I was scared of him. We got in some fights in our past, and I usually ended up on the short end of the deal.

Q And after you got back in, did he say anything to you about telling anyone?

A All I remember is the screaming, just screaming, not saying anything, just screaming, and all [320] I remember him saying was that if I didn't shut up, I'd never see my family again.

Q When he gave that threat to you, what did you say or do?

A The next thing I remember, I stopped screaming, and I sat straight up in the truck, and I seen the stoplight, and it was like I didn't remember a thing. I mean I asked him to take me to the beach.

Q And did there come a time when he went back to his place?

A All I remember now is arguing with him about taking me to the beach.

Q Did you get back to the apartment, to where he was living?

A Yeah, he wouldn't take me to the beach, and we got back to the apartment, and I remember getting out and still arguing about I wanted to go down to the beach, and I can remember somebody at the other apartment hollaring [sic] at us to quiet down.

Q That was someone else in another apartment?

A Yeah.

Q You two were arguing; is that correct?

A Correct.

Q And where did you go after that?

[321] A I opened the door, and I went in, and I folded down the couch bed, and I layed down and passed out.

Q What time would this have been about?

A It seemed to be about 1:30, 2:00. I didn't look at the clock, but I kind of remember. I believe the bars down on the beach didn't close until four, and that's why I wanted to go because I wanted to go down to the bars down on the beach.

Q Do you recall if anyone slapped anyone or punched anyone?

A I don't recall.

Q Would you have slapped or punched him?

A No.

Q And you went and fell asleep then on the sofa; correct?

A Yes.

Q Do you know if he left after that?

MR. RICH: I object to that. If he is asleep, how could he possibly know?

MR. HANCOCK: That's what I am asking, Judge.

THE COURT: Overruled.

THE WITNESS: Well, one of the other guys that stayed at the apartment came home from [322] work before daybreak, and it was around six o'clock in the morning when he got home from work, and when he come in the door, I woke up, and I sat up, and there's a picture window right there that is right by the parking space to the apartment.

Q (By Mr. Hancock) Did you see the pick-up there?

A No, and I asked –

Q You can't say what he told you. That would be hearsay. You asked somebody about it; right, where Denny was?

A Well, when I looked out, and I didn't see the truck, I asked Randy if Denny's truck was out there, and he said no.

Q And what did you do after that?

A I layed back down figuring he went out and partied. I layed back down and went to sleep.

Q And when would you have woken up again?

A It was at daybreak, around seven, eight o'clock in the morning.

Q At that time, did you see the pick-up?

A I got up, and it was – it was a real hot sunny morning, and I got a cigarette and walked outside, and his truck was out there, and it seemed [323] strange and funny to me because the whole week I was down there, it was never – the doors were always locked and everything, and this time, when I walked out, he wasn't around, and the doors were – both doors were open.

Q And as a result of seeing both doors open, what did you do, or what did you observe?

A As I lit my cigarette, I walked around the back of the truck, and as I looked in the back of the truck, I seen a dark line down one of the ridges of the bed of the truck, and I had a first impression. I don't really know, but I had

a first impression of what that looked like, but I didn't check it out or nothing and –

Q Was that there the night before?

A Not to my recollection. The truck was clean.

Q Was there some bushes or leaves in the back there?

A I didn't see any bushes or leaves, just that dark line down the bed of the truck, and then I went around to the passenger's side and sat down in the seat, and in the truck, I seen there was a woman's shoe and a set of keys and a cloth item.

Q Let's take them one at a time. The shoes, [324] can you describe the shoes you saw?

A Well, I picked the shoe up. It was a dark color, seemed like brown now, but it was a dark color woman's shoe. I picked it up and looked at it and set it on the –

Q Was it a high-heel type shoe?

A Yes, it was a high-heel type shoe.

Q And then you said that you saw some keys. Where were the keys in the truck?

A The keys were on the floor.

Q Can you describe those keys?

A It seemed like a set of keys with four keys on a ring and had an emblem of the car or something. There was an insignia of some kind on the ring too.

Q Do you recall what type it was, at best you can?

A It seemed like a horse, but –

Q Now, what about the article of clothing you saw, can you describe that as best you can?

A Today, looking back, it seemed like it was a girl's sweater or blouse – or not a blouse, but a sweater of some kind.

Q What color do you recall it being, Gary?

A Off white.

[325] Q Now, can you tell the ladies and gentlemen of the jury what you did with any of those items?

A Well, I set the shoe on the dash, and I hung that cloth item over the driver's door, and holding the keys, I was thinking that, you know, they got to be somebody's keys, and as long as I have the keys, they will have to come to me to get them, so I took the keys, and I got out of the truck, and I dropped the keys in the trailer next to the truck that he used to take the pool materials around, pool cleaning materials around with, and I brought them and dropped them down between some buckets and went and sat back down in the truck.

I hollared [sic] for Denny, and he didn't answer, so I sat down in the truck waiting, and I passed out in the heat, being a little hung over from the night before, and in the heat of the morning, I passed out, and when I woke up, the doors of the truck were shut. I was still sitting in the vehicle, and the doors were shut, and the truck was cleaned, and there was nothing left in the truck, and it had been cleaned.

So, I got out of the truck and hollared [sic] for him. He didn't come around, so I went in, and I sat on the couch, and I was in there about a minute or two, and he came walking in and stood in front of me, [326] and the first thing I seen were three gouges on his left cheek.

Q And can you actually describe him? What did they look like; gouges you said?

A It looked like – to me, it looked like three fingernails, three finger gouges right there.

Q Now, what if anything did you do with the keys?

A Well, I asked him what the hell happened to him, and he went on to tell me about a fight he got in that night, that somebody was monkeying around the truck. I asked him – I kind of didn't believe it because I knew his past, and he never –

Q Let me ask you this: Did he tell you who had done that to him?

A The girl that was with the guy he got in the fight with.

Q Now, you were with him the night before; is that correct?

A Correct.

Q Did you see him get – besides the incident you've described for the ladies and gentlemen of the jury, did you see him get in any fight with any guy or girl?

A No.

[327] Q And so when he told you that story, what if anything did you say to him?

A I told him he was lying because I knew him, and I knew he'd never let anybody get that close to him.

Q What happened to the keys?

A Well, I wanted to go down to the beach and go swimming, and we went out in the truck, and we talked about it, and I mentioned that I had the keys, and I wanted to know whose keys those were, and whose stuff that was in the truck, and he said it was the people that were monkeying around the truck, that he got in a fight with, and he asked me to give him the keys.

I told him I wouldn't give them to him, unless he told me the truth, and that I would hold the keys until somebody came after them, and he got real furious, and I could tell that if I didn't give him the keys, it was going to be a knock down drag out, and rather than fight right there in front of the apartment and stuff, I went and got the keys and gave him the keys.

Q Did he have that same look that you have described, like he was possessed at that point?

A He was on the verge. I mean it wasn't – [328] the eyes didn't roll, but I could tell if I didn't get the keys, it was going to be a knock down drag out.

Q So, you gave him the keys then; is that correct?

A I just gave him the keys, too.

Q Did you ever see this sweater or this shoe again or this artical [sic] you thought was an off-white sweater?

A No.

Q Now, when did you leave, Gary?

A It was a Sunday afternoon, I believe two days after New Year's Eve. It was a Sunday afternoon, after New Year's.

Q Before you left, did you go anywhere? Did he take you anywhere?

A Well, I got up Sunday morning. He asked me if I wanted to go see the Everglades, and there wasn't a whole lot of time to do anything else, so I said yes, let's go out and see the Everglades, and we went out 84, passed the Banana Boat and went passed like a check station. It was a little white building that was right there on the highway and went through there and out a couple of miles and pulled into a little spot, where there was a guy fishing off the road.

[329] Q Whose idea was pulling into that little spot? Was any discussion had?

A No, he just pulled in there.

Q Did he get out at that time and look around?

A Well, we both got out of the vehicle, and I went up and was talking to the guy fishing, seeing what he was catching.

Q Then where did you go?

A Then we turned and headed back towards the apartment, and there was some kind of park like thing, where you can get some fruit.

Q Did eventually you go to the airport then?

A Yeah, I got some oranges and stuff, and then it was time to go to the airport, and he drove me to the airport.

Q Did he say anything that you thought was unusual, when you got to the airport?

A Yeah, after we went up through the checks and everything, and I was about ready to walk up to get on the plane, the last thing he said to me was: "I am glad to get you out of here."

Q Where did you go then, Gary?

A I got on the plane.

Q Back to your family?

[330] A Yes.

Q Where was that?

A At that time, it was on Zales (phonetic) Road.

Q In Michigan; correct?

A Yes.

Q Now, then there came a time when detectives came to see you; is that correct?

A Yes.

Q Where did they first come in contact with you at, Gary?

A It was the following Friday, at my work at Oldsmobile.

Q And do you recall who they were that came and talked to you?

A John and Paul, two detectives.

Q And did they show you anything?

A Yes, they showed me – first they asked me if I knew where Denny was, and I said, "No, the last I seen him was in Florida, the weekend before," and they showed me a picture of the two girls.

Q Let me show you State's Exhibit 27 in evidence. Do you recognize that?

A Yes.

Q And did they show you that?

[331] A Yes.

Q Did they have you write anything on the back?

A Yeah. I believe that's my signature.

Q That's your signature?

A Yes.

Q And I don't see the date on there. Do you know how many days it was, after you flew back, that the police came?

A Yeah, it would have been what, five days? I left on a Sunday and it was the following Friday.

Q And then I show you State's Exhibit 23 in evidence, Gary, and I ask you if you recognize that. Look on the back and see if you signed it? Is that your signature?

A Yes.

Q And on the other side, do you recognize that?

A Yes.

Q Now, they also showed you that; is that correct?

A Yes.

Q And you identified him as your brother, Dennis; correct?

A Yes.

[332] Q And did you give a statement to the police at that time?

A Somewhat of – you know, yeah, we talked.

Q Now, did you cooperate with the police?

A Yes.

Q Can you tell us how you cooperated with the police?

A Well, at Oldsmobile, I had told them about the marks I seen on his face and the keys. No, I didn't remember the keys at that time.

Q You told him what you knew?

A I told him what I know.

Q Besides that, did you give him like fingerprints, hair and blood samples? Do you remember doing that?

A Okay, that was – I believe that was the following afternoon.

Q Now, did there come a time when you agreed to go somewhere with the detectives?

A Well, when they told me that Patty was missing, the marks – some things that I had remembered at that

time just bothered me, that I had to know for sure for myself, and I offered to come back to Florida and retrace our steps that night, to see if there was something that I wasn't remembering, something that –

[333] Q So, you voluntarily came back with the detectives; is that correct?

A Yes.

Q Now, let me show you what's marked State's Exhibit – it's a copy of State's Exhibits AAA and BBB. Let me show you AAA for identification. Look and see if you recognize your signature.

A Yes.

Q And also State's Exhibit BBB for identification. Do you recognize that?

A Yes.

MR. HANCOCK: We ask that these be introduced in evidence.

MR. RICH: No objection.

THE COURT: Maybe received.

THE CLERK: State's Number 36 and 37.

MR. HANCOCK: May I proceed, Your Honor?

THE COURT: Yes.

Q (By Mr. Hancock) Now, after coming down, can you tell the ladies and gentlemen of the jury what you did when you came back to Fort Lauderdale?

A Well, we drove out – the detectives drove me out to the Banana Boat, and then we went out 84 and looked around.

Q What were you looking for?

[334] A I believe it was trying to find a spot or something that would help me recall.

Q Now, did there ever come a time when you met Patty's mother?

A Yeah, later that evening, they brought Patty's mother –

Q And as a result of meeting Patty's mother, did you have occasion to go with the police again to help try to find the body of Patty?

A Yes.

Q And where did you go that time?

A I went out 84 again and another spot by a house, back by the Banana Boat, but a median out on 84 kind of – it seemed to do something like a memory to me, but I wasn't – you know, it just looked like the green that I recalled it.

Q You weren't familiar with the area; right, and plus it was late at night when you were out there; correct?

A Correct.

Q You were never able to identify the exact spot; correct?

A Not to my knowledge. I couldn't pinpoint.

Q Now, when is the last time you heard from your brother?

[335] A About approximately two months ago.

Q But before that, when is the last time after you left Fort Lauderdale and went back to Michigan?

A I never heard from him again, until when he was arrested.

Q And do you know where he was arrested at, what state?

A I am not sure what state. I think South Carolina, Georgia, something like that.

Q And do you recall when that was, how long ago that would have been, Gary, approximately?

A It was May.

Q 1986?

A Yes.

Q And what happened after he was arrested?

A The detectives came to my house and told me that they had arrested him for driving through –

Q Without saying exactly what it was, what I am asking is: There came a time when you found out he had been arrested; correct?

A Yes.

Q And as a result, did the police take another statement from you?

A Yes. We went to the State Police Post, [336] and they were questioning me at the State Police Post in Iona, and at that time, I told them about this image that I couldn't explain, about my face being in my hands in my lap and screaming at him, and that for the past year or two, that this kept coming to me, and I couldn't place it, why I was like that, why I was screaming at him.

Q Then you gave a statement; is that correct?

A Yes.

Q And now that night at the Banana Boat, were you intoxicated?

A Yes.

Q Were you drunk to the point you didn't know what was going on?

A No, I always knew what was – you know, I had an alcohol problem for years, but I was able to control myself under the influence.

Q Were you able to control yourself that night?

A Yes.

Q And how about your brother Dennis, was he in control of himself?

A When?

Q That night when you saw him?

[337] A At the bar?

Q Yes, at the Banana Boat.

A At the bar, yes, he was in control.

Q Now, who had more to drink, you or him?

A I didn't sit with him, so I don't know how much they had to drink, but from the way things were going, I would say that I had quite a bit more than the others.

Q Now, you indicated that you had talked to your brother; is that correct, the last time, a couple of months ago?

A Yeah, he was in jail. He would call.

Q And as a result, did he tell you or ask you to do something or say something?

A I told him I didn't want to discuss the case, let's just talk brothers, then he mentioned – I guess he read my statement, and he said that there were some things in my statement that he wished I wouldn't say.

Q What did you tell him?

A I told him that they were things that I knew to be true. I had to say them.

Q Now, the final question, Gary. Do you see him in the courtroom today?

A Yes.

[338] Q Can you point him out, for the record, please?

A He is sitting at the defense table.

MR. HANCOCK: Your Honor, may the record reflect he's identified the defendant, Dennis Sochor?

THE COURT: Yes.

MR. HANCOCK: Thank you very much. Thank you, Your Honor.

MR. RICH: May it please the Court, Mr. Hancock.

CROSS EXAMINATION

BY MR. RICH:

Q Mr. Sochor, as you sit there today, do you have an independent recollection of the events that occurred on New Year's Eve in 1982?

A Yes.

Q And back in January of '82, you made a statement to Detective Paul Lauria? The time of the statement was 6:34, at the Oldsmobile Plant in Michigan.

A Yes.

Q Do you remember that statement?

A Yes.

Q Do you have a vivid recollection of what [339] had occurred January 1st, 1982?

A No.

Q Do you remember giving that statement consisting of twenty-eight pages and consuming about an hour and twenty-four minutes? Do you remember giving that statement?

A At the Oldsmobile Plant?

Q Yes.

A Yes.

Q It took about an hour and a half to give that statement?

A Yes.

Q Do you remember meeting a Sergeant John Feltgen at the Oldsmobile Plant, along with Paul Lauria?

A Yes.

Q Do you remember them identifying themselves as police officers from Broward County?

A Yes, that is the first thing they did.

Q And do you remember what you said to them, when they first identified themselves to you as police officers?

A Yes.

Q What did you say?

A "Now what did he do."

[340] Q You didn't say anything else like "Denny didn't do it?"

A I asked, "Now what did he do."

Q You didn't say, "Denny didn't do it. Denny didn't do it?"

A I don't recall saying that.

Q At that particular statement though – you do recall giving that statement; right?

A Certain things I remember saying at that time.

Q Do you remember telling them, back in January of 1982, that when you and Denny left the Banana Boat, that Patty was still standing by the car?

A I remember saying that.

Q And Denny left alone?

A I remember saying that.

Q Was that your best recollection, or was it just a lie?

A It was my best recollection at that time.

Q So, that's what you told them, that when you and Denny left the Banana Boat, that you were driving; correct?

A No

Q Denny was driving?

A Right.

[341] Q You were a passenger?

A Correct.

Q And Patty was standing by the car, Delta's car, at the Banana Boat?

A That's what I said the first time.

Q And the two of you left alone?

A Correct.

Q And that there was no problems at all with Patty?

A I said that at first, yes.

Q And was that your best recollection of what had occurred when you made that statement?

A At that time.

Q Do you remember whether or not Denny and Patty kissed good-by?

A Yes.

Q Did you say that?

A Yes, I said that.

Q That occurred just before you and Denny left the Banana Boat; right?

A Correct.

Q Would you say your recollection was better when you made this statement back on January the 8th of 1982, or would you say that your recollection is better now, five years later?

[342] A Now.

Q I see. This occurred maybe six or seven days after the incident; right?

A Correct.

Q And you were telling the truth at this time, were you not?

A To my best recollection, I was.

Q And you raised your hand, and you were sworn in by the police officer to tell the truth and nothing but the truth; is that correct? Do you remember doing that?

MR. RICH: If I may approach the witness, Your Honor.

THE WITNESS: I don't remember raising my hand and being sworn in, but –

Q (By Mr. Rich) May I show you this? This is the one that was taken January the 8th, 6:34 p.m., at the Oldsmobile Plant in Lansing, Michigan; right?

Did you have occasion to read and sign that statement?

A I didn't read this.

Q Did you ever sign that statement?

A At the Oldsmobile Plant?

Q Yes, sir.

A No, I don't remember signing the [343] statements at the Oldsmobile Plant.

Q Do you remember raising your hand and swearing solemnly to God to tell the truth, the whole truth, and nothing but the truth? Do you remember that?

A They didn't swear me in at that time.

Q What does it say there? The police officer is now lying? Doesn't it say that?

A Just a minute. I was told I was under oath, but – yes, just like it reads there, just like it reads.

Q And you swore to tell the truth and nothing but the truth, so help you God?

A Yes.

Q And you told the truth at that time, so help you God?

A To what I could remember at that time.

Q And what you remember at that time was that when you and Denny left the Banana Boat, Patty was still there, alive and well?

A That's what I said at that time, yes.

Q And throughout that entire statement, an hour and a half, you persisted and repeatedly stated that this was the truth and nothing but the truth?

A Yes.

[344] Q Statement number one is the truth, as you knew it January the 8th of '82?

A Correct.

Q Okay. That statement started about 6:34 in the evening; is that correct?

A Yeah, I was there about an hour.

Q And the statement ended about 7:35 p.m. at the plant?

A At the plant.

Q An hour and twenty-four minutes?

A That sounds –

Q Two police officers there interrogating you, asking you detailed questions, and you still insisted that at that point, Denny and you had no involvement, and that Patty was okay? For an hour and a half, you insisted on that?

A I didn't say Patty was okay. I said that Denny and I had nothing – that I didn't recall. I remembered Patty at the car, when we left the parking lot.

Q And she was standing in the parking lot?

A That's what I said at that time.

Q Statement number two, remember that one?

A Yes

Q Where was that taken?

[345] A State Police Complex in Lansing.

Q Well, this statement was at 7:37. You are still at the Oldsmobile Plant. Do you remember that this consisted of eleven pages? Let me show you that statement. Did you ever read this statement, and did you ever sign this statement, the second statement?

MR. HANCOCK: What's the date of that one?

MR. RICH: 7:37, January the 8th, 1982, continuation of the same.

Q (By Mr. Rich) Did you ever read it?

A If I could read a couple of questions, and I can remember where the questions were asked.

Q Sure, take your time. That would be at the Oldsmobile Plant, a continuation of the tape. Remember, they stopped the tape, turned it over, and continued asking you questions for another seven or eight minutes?

A No, sir, because this question here wasn't taken at the Oldsmobile Plant.

Q Where was that taken?

A I believe that was at the State Police.

Q I have another one. That's your third statement. I will show you that one. You don't remember where they turned the tape over and continued asking you more questions?

[346] A Okay, this was possibly at the Oldsmobile Plant.

Q They went on for another – I don't know. They started at 7:37 and ended at 7:50, so another fifteen, twenty minutes; right?

A Yes.

Q And in that statement, you still insisted that when you and Denny left the Banana Boat parking lot, that Patty was there in the parking lot and was okay? That's you're second, fifteen minute, statement?

A Correct.

Q And you told them at that time that you were telling the truth?

A That I could not remember Patty getting in the vehicle.

Q But you were telling the truth?

A Yes.

Q And you did state positively that when you and Denny left, Patty was still in the parking lot?

A Yes.

Q That's your second statement; right?

A Yes.

Q And you were truthful at that time, back on January the 8th, 1982, at 7:30 p.m., in front of Paul Lauria and John Feltgen?

[347] A Yes.

Q The truth, the whole truth?

A What I could remember.

Q The third statement, do you remember that one, January the 9th, 1981 – I'm sorry, 1982. They made a mistake too. I will show you. That statement started at about 2:55, on January the 9th, and ended at 3:17, about twenty-three minutes. Do you remember that third statement?

A Yes.

Q Where was that taken?

A State Police Headquarters in Lansing.

Q And who was present at that time, besides you, Paul Lauria, and John Feltgen, if you know?

A I am not sure.

Q State police?

A That seems like – well, it seemed like a lot of state police around.

Q Were you handcuffed?

A Not at that time.

Q Were you locked up?

A Not at that time.

Q Were you ever handcuffed?

A Once.

Q When?

[348] A When I came down to Florida.

Q They handcuffed you?

A Yes.

Q Were you under arrest?

A No.

Q Did you voluntarily come to Florida?

A Yes.

Q Why did they handcuff you?

A I didn't know.

Q During these first two statements that you gave on January the 8th, did Paul Lauria and John Feltgen ever indicate to you that you might be charged with murder, if you didn't cooperate?

A Not really. I mean they never –

Q Either they did, or they didn't. It's like being pregnant; either you are pregnant, or you're not. Did they tell you that if you did not cooperate, you would be charged with first degree murder?

A They didn't say those words.

Q Well, tell me what they said, please.

A They mentioned that if Denny was found, if he was questioned, he could say things that would incriminate me.

Q Were you a suspect at this point, in a first degree murder investigation?

[349] A I am not sure.

Q Did they give you any warnings, pursuant to your right to remain silent, before you made these statements?

A Yeah, they asked me if I wanted a lawyer, I had the right to remain silent.

Q So, they gave you all of these warnings that they give a suspect in an investigation; right?

A Yes.

Q Did you feel that when Lauria and Feltgen came up to you at the Oldsmobile Plant that they were investigating you for this murder?

A No.

Q Did you feel that if you did not cooperate with them and tell them what they wanted to hear, that you would be charged with murder?

A I didn't feel that I was being charged with murder, no.

Q Did they indicate in anyway that you could be charged with murder, if you did not play ball with them, and cooperate in giving a statement?

A They never said it, but –

Q But what?

A I guess –

Q You guess what?

[350] A I got the impression that – I guess I got the impression that at one time I was, yes.

Q That you was what?

A A suspect.

Q In a murder case?

A Correct.

Q And that you might get life imprisonment or the electric chair, unless you cooperated with these police officers in giving them a statement that they wanted to hear; correct?

A That they wanted to hear?

Q Yes.

A No, not that they wanted to hear.

Q They weren't too satisfied with these first two statement, when you stated that you and Denny had no involvement in this kidnapping/murder. They weren't satisfied with that, were they?

A Because I kept remembering things.

Q I see. The spector of the electric chair hanging over your head did not make you remember things, did it?

A No. Things would come me, just things would come.

Q But in the back of your mind, you never did think that maybe you might be sitting in the [351] electric chair, if you didn't give a statement and get these two cops off your back?

A No, I never thought that.

Q You never thought that?

A No.

Q Even though you got the impression, you never thought that?

A I didn't think that I would get the electric chair.

Q What did you think you would get?

A Nothing. I was innocent.

Q I see. And you said Denny was innocent. On numerous occasions, you said Denny was innocent.

A I didn't say he was innocent. I said I didn't recall Patty being in the vehicle.

Q That's not what you said, is it? Would you like to read what you said? Would you like to read what you said?

A Yes.

MR. RICH: Page ten, Kelly, first statement.

MR. HANCOCK : Top? Bottom? Middle?

MR. RICH: Well, starting with "All right, when you left the Banana Boat, did you want to go some place else?" What was your answer?

[352] THE WITNESS: "Yes."

Q (By Mr. Rich) "Were you alone with Dennis?" What was your answer?

A "Yes."

Q "Was Patty in the lot when you left?" What was your answer?

A "Yes."

Q You remembered it pretty good then, didn't you?

A At that time, it seemed that that's the way it was.

Q "Did she waive good-by to Dennis?" What was your answer?

A "Yes, we just left."

Q So, you remembered it pretty good back then, didn't you? Before they told that you were a suspect in a murder case, you remembered it pretty good back then.

A No, not before.

Q Were you a suspect in a murder case at that point, January the 8th, 1982?

A I didn't believe I was a suspect at any time.

Q They never mentioned the fact that you might be a suspect, January the 8th? The second [353] statement, they never mentioned that you were a suspect, just a witness? That's why they handcuffed you, when they

brought you back because you were just a willing witness?

A They didn't handcuff me when they brought me back. I came down voluntarily.

Q You just said that when you came down here to give a statement, that you were in handcuffs?

A No.

Q When were you in handcuffs?

A When I met Paul and John's boss. I don't know what was said.

Q Did you come back in the airplane with Paul Lauria and John Feltgen?

A Yes.

Q Were you in handcuffs on the airplane?

A No.

Q Were you in handcuffs, when you got off the airplane?

A No, not when I got off.

Q When did they handcuff you, when you got in the car?

A When I got to the office, BSO office, Broward Sheriff's Office.

Q They handcuffed you?

[354] A Yes.

Q While they were interrogating you?

A No, they just handcuffed me, put me in a cell for a couple of hours.

Q I see. Alone?

A Yes.

Q Well, while you were in that cell handcuffed, for a couple of hours, did you feel that you might be in some way implicated in a murder case?

A No, I fell asleep.

Q It didn't bother you at all?

A I was pretty tired.

Q You were pretty what?

A Tired.

Q So, you were just handcuffed in a cell for a couple of hours, and you fell asleep?

A Yes.

Q So, you are back at the Broward Sheriff's Office. that was around January the 9th, 1982; right?

A Pardon?

Q The third statement, that was the Lansing Police statement. Remember that?

A Of?

Q January the 9th, 2:55 p.m., the next day.

A The next day, yes.

[355] Q They took you to the police department in Lansing, Michigan; right?

A Yes.

Q Were you handcuffed then?

A No.

Q Did they administer the oath to you at that time?

A I believe they did.

Q And did they advise you that if you give a false statement, they could charge you with perjury?

A I believe that was said.

Q Did you ever read that statement and sign it?

A I didn't ever read any statement.

Q They never showed you any of these statements, and you never read any of these statements, and you never signed any of these statements?

A I may have signed them. I am not sure. I don't remember signing them. I know I didn't read them.

Q All right. So, in the third statement, you still insisted to Paul Laurie and John Feltgen that you had no knowledge of Patty ever being in that truck and no knowledge of any homicide; correct?

A I told them I didn't remember if she got [356] in the vehicle, that to my recollection, she didn't.

Q Now, that night that you were there at the Banana Boat, what time did you arrive?

A Somewhere after six, shortly after six.

Q And did you smoke any marijuana there?

A I had a little, a little bit.

Q Just a little bit? How much liquor did you drink?

A Quite a bit.

Q What's quite a bit?

A Oh –

Q A fifth?

A Throughout the night, it was probably getting close to that, in mixed drinks.

Q A fifth of seven and seven, is that your drink?

A That's what I was drinking.

Q Was that seven and seven?

A Seagrams and seven.

Q So, you drank about a whole bottle of liquor that night, a fifth of liquor that evening?

A It's hard. I don't know how many shots are in a fifth, but –

Q Sixteen or seventeen?

A At least.

[357] Q More?

A I am not sure.

Q And you smoked a joint?

A Not a whole one.

Q Half a joint?

A I probably took three hits.

Q Did anybody else take any hits with you?

A No.

Q Just You?

A Yes.

Q And during that time, while you were getting drunk – you were drunk?

A I was drunk.

Q Were you with Denny the whole time?

A No.

Q Did you have occasion to observe how many drinks Denny had?

A When I come around and looked around the corner, they had drinks.

Q Everytime?

A There was a glass on the table.

Q Did you know Denny to be a heavy drinker, when he goes out drinking on New Year's Eve?

A The few times that Denny and I went out, yes, we drank.

[358] Q Heavy? Everytime you went out, he was a heavy drinker?

A With me.

Q So, you don't really know how much Denny had to drink that night, you were pretty drunk yourself; right?

A Correct.

Q And you don't know how many drinks Denny had that night?

A No, I don't.

Q Would you say he was drunk too?

A I –

Q With all the drinks that you had, were you in a position to determine whether Denny was drunk also?

A I didn't make it a habit of judging other people's sobriety.

Q So, you don't know if he was drunk or not?

A By our arguments that we had about driving, I would say he was moderately drunk.

Q Moderately drunk. You said you were drunker than he was?

A Yes.

Q But you don't know how many drinks Denny had that evening?

[359] A No, I don't.

Q Fourth statement, do you remember that one? It was taken February 27th – no, I'm sorry, that's your birthdate; isn't it?

A Yes.

Q It was taken January the 11th, 1982, 4:25 p.m. Do you remember that statement? This was down here at the

Broward Sheriff's office; right? Remember that statement being taken there?

A A couple of statements, different.

Q Do you remember what you said in that statement?

A I am not sure which statement down here.

Q Let me ask you this: You state now that Patty got in the truck with you and Denny; right?

A Yes.

Q Did you force her into the truck?

A No.

Q Did Denny force her into the truck?

A No.

Q She got in the truck of her own free will?

A Yes.

Q And you were all going to go out and get something to eat; right?

A Yes.

[360] Q When did you decide, Gary, to change your testimony from you and Denny had nothing to do with it, to Denny did it all, and you did nothing? When did you decide to change your story?

A It wasn't really a decision to change my story. I was dealing with having my face in my hands, screaming at him.

Q Well, you didn't actually see what happened, did you?

A No.

Q You just know that there was a struggle outside the vehicle, that Patty didn't get back into the vehicle?

A Correct.

Q And you don't know what happened outside the vehicle?

A No.

Q Well, all in all, you made another statement too, June the 4th. That was after Denny was arrested for running a red light down in Georgia, another state.

Now, you came back here, and you tried to locate the body of Patty, and you weren't able to find anything that was familiar. Why was that? Is that because you were so drunk, you didn't know where you [361] were going or what you were doing?

A I don't know why I couldn't.

Q Do you attribute it to the fact that you were so drunk that you didn't know what you were doing or where you were going?

A I attribute that what happened was so traumatic that it was blocked out of my mind. My mind wouldn't deal with it. When I sat up, on the way back, when I sat up, everything that happened was just blocked out.

Q Well, did you attribute the fact that you were unable to help Patty was because you were in such a state of drunkenness that you couldn't do anything?

A Yes.

Q So, when you tried to do something, you described Denny as being possessed?

A That's the way I see him.

Q You mean demonic possession, possessed by the devil? Is that what you mean?

A That's the way I seen it.

Q Describe what you mean by that. You said something about his eyes?

A The pupil would roll in his head and all you would see was white.

Q What else about his voice?

[362] A It got real deep.

Q Would it sound like Dennis' voice?

A No.

Q And that's when you feared him, when he got to that stage?

A Oh, yes.

Q Did he ever get to that stage when he was drunk?

A Once.

Q And his eyes would roll back, and his voice would change, when he was drunk?

A One time when he was drunk, and one time when we were kids playing football with my other brother. He chased me down the road for a half a mile.

Q But you have seen the eyes roll back and that?

A Oh, yes.

Q His voice would change, when he was drunk?

A Oh, yes.

Q You also had an interview and a statement with a reporter, did you not?

A I had a reporter once call me at home.

Q In regards to this case?

A Yes.

Q Did you ever indicate to that reporter or [363] to your brother that you were going to make a million dollars out of the story of this case?

A No.

Q Did you ever tell Denny that?

A No.

Q Where did that come from?

A Where did –

MR. HANCOCK: I don't want to object, but he is assuming fact not in evidence.

MR. RICH: Well, I am asking if he ever said that, Your honor.

MR. HANCOCK: Well, He said no.

Q (By Mr. Rich) Did you ever say that to anyone?

A No.

Q Have you ever been under the treatment of or hospitalized in a psychiatric or mental hospital?

A I committed myself once.

Q When was that?

A I am not sure of the date. It seems to be around '83, '84.

Q Eighty-three or eighty-four?

A I got in a jam at work at Oldsmobile and got thirty days off and –

Q Thirty days off suspended?

[364] A Thirty days suspension from work, and my committing [sic] man said if I commit myself to an alcohol program, I could get paid for the time off.

Q Do you have a problem with alcohol abuse?

A Yes.

Q Do you have a problem with drug abuse?

A No.

Q Do you admit to using drugs?

A I smoked marijuana, yes.

Q That's a drug, isn't it?

A I suppose.

Q Is it?

A I never looked at it as a drug, no.

Q Now, when you were in this psychiatric hospital, how long were you there?

A I was there for approximately two weeks.

Q And did you have any problems that you discussed with psychiatrists?

A Yes, work problems, work related problems.

Q In regards to what, alcohol?

A Yeah, alcohol and why I didn't get along with some of the people I worked with.

Q Would you classify yourself as an alcoholic?

A Yes.

[365] Q Do you have problems with it now, or did you get –

A No, I have learned to control my drinking.

Q Now, while you were in this place – that was Forestview Hospital; right?

A Yes.

Q Did they put you on medication called lithium?

A Yes.

Q What's lithium for, if you know?

MR. HANCOCK: Judge, can we approach the bench?

(The following proceedings were had at the bench, between Court and counsel, out of the hearing of the jury.)

MR. HANCOCK: Judge, I don't want to instruct Mr. Rich, but you know, I think there is a certain point I

have to object, and I don't think I've made any objection up to this point in the whole trial, but I think we are talking about an incident in eight-three [sic] or eighty-four. I don't see what relevance that has to an incident that occurred in eighty-one or eighty-two.

If Mr. Rich is going to tie it in somehow, [366] or if he is going to quit asking this line of questioning, I will withdraw my objection.

MR. RICH: I am through. I will just ask about the lithium, if he knows, real quick.

MR. HANCOCK: Okay. I think this is all, you know, not proper.

MR. RICH: The credibility of the witness –

THE COURT: Go back to the credibility at the time of this offense. You're about finished with it?

(Thereupon, the following proceedings were resumed within the presence of the jury:)

MR. HANCOCK: Judge, I respectfully withdraw my objection.

Q (By Mr. Rich) Do you know what lithium is for?

A Pardon?

Q Do you know what lithium is for?

A No.

Q They gave you lithium –

A Yes.

Q – in the psychiatric hospital?

A Yes.

Q Out of all of these statement and your [367] testimony, when I took your deposition October the 5th – you remember that, don't you?

A Yes.

Q What you are saying today is the truth?

A Yes.

Q What you were saying back in January is the truth?

A I didn't remember parts back then.

Q Would you say that the constant interrogation by these police officers, and your alcohol problem caused you to change your mind and –

A No.

Q – and change your story?

A No.

Q What do you attribute to the change in your story from January until today?

A My story really didn't change. I was just missing a little part that my mind blocked out. My mind wouldn't allow me to remember because of it being so traumatic to me.

Q Well, how did you reconcile the fact that in your statement in January you said one thing, and today you are saying another thing that's directly opposite to what you said in January?

A Pertaining to what?

[368] Q Well, for example, in January, you said you left Patty standing in the parking lot. Today you said she got into the truck of her own free will.

A At the time, I didn't remember anything from the time that we left that bar, until we got back in the apartment for years.

Q Why didn't you tell them, "I don't remember?"

A Pardon?

Q Why didn't you tell the cops, "I don't remember"

A Because I didn't know I didn't. It wasn't until after going over it in my mind, the screaming at him with my face in my hands and trying – and in my own mind having to deal with why I was like that and putting that – and I knew I was doing that on the way home from the bar, and I couldn't figure out why I was doing that on the way home from the bar, until all the –

Q So, you had amnesia, is that what you are trying to say?

A No. I said what happened was so traumatic to me –

Q So, you forgot about –

A – that my mind blocked it out.

[369] Q You forgot about it?

A My mind wouldn't allow me to remember it.

Q You forgot about it, but you didn't tell the police officers that you forgot about it?

A Because I didn't know.

Q This other girl, Delta, that you took out to the car, was she pretty drunk that evening?

A Yes.

Q Is that why you took her out to the car, because she was drunk?

A Yes.

Q So, today you are saying after five years you remember everything?

A Yes.

Q And back in January of 1982, you didn't remember anything?

A I remembered some things. Some things my mind wouldn't let me remember it.

Q When they were interrogating you, they showed you those pictures of Patty. Did they suggest to you any of the answers that you were to give?

A No.

Q They just asked you questions, and you gave the answers, to sort of jog your memory?

A Yeah, like the keys. They mentioned if I [370] ever seen any keys, and it was three or four minutes later –

Q You don't know who these keys belong to?

A No, never seen them before that night, and I didn't see them after that night.

Q That morning.

A Yes.

Q You didn't know whose keys they were?

A No.

Q Now, you said that you and Denny had a fight when you got back there because you wanted to go to the beach, and he didn't want to take you to the beach; right?

A Right.

Q Is that when the neighbor came out?

A At the apartment, yes.

Q And started saying something about quiet down, or something like that?

A Yes.

Q You were arguing then about Denny not taking you to the beach; right?

A Right.

Q Not about anything that had occurred that evening at the Banana Boat?

A Right.

[371] Q When you had that argument out there, were the two roommates, the two brothers, were they in the apartment at that time?

A Just one.

Q Which one, Randy or Barry?

A Barry.

Q Did Barry come to the window, or did Barry, come out and try to stop the argument?

A No.

Q Did you see Barry?

A No, I heard him upstairs when I went in.

Q How did you hear him? Did he say anything to you?

A Just made noises. If I recall, I heard the bed.

Q So, that argument was about Denny not taking you to the beach, not anything about what happened at the Banana Boat?

A Correct.

Q Now, at any time, did they charge you with any crime in connection with the Banana Boat as an accessory?

A No.

Q Or as a material witness or –

A No.

[372] Q Nothing like that?

A I was never charged

Q They never charged you with a crime?

A No.

Q They never charged you with perjury because of your inconsistent statements, or anything like that?

A No.

Q Now, it seems to me that you arrived home at about 1:30 in the evening; right?

A Pardon?

Q January the 1st, 1:30 a.m., you arrived home?

A It seemed about that, 1:30, 2:00.

Q And then you woke up again about six o'clock in the morning?

A Yes.

Q And when you woke up, it was because one of the brothers came in, Barry or Randy?

A Correct.

Q And you looked out, and you did not see the car?

A Truck.

Q This truck, this Datsun?

A Right.

[373] Q You don't know where Dennis went?

A No.

Q You don't know whether or not he received the scratches, as he described to you, in a fight with another man and another woman at another bar? You don't know that, do you?

A No.

Q Do you know if he received the scratches from the incident that you described at the Banana Boat?

A No.

Q Do you know if you received any scratches?

A No. Well, I had one on my nose.

Q On your nose?

A Yes.

Q From Patty?

A All I remember is getting up the next morning, and when I looked in the – went in the bathroom, I had scratches along my nose.

Q Could that be a scratch from Dennis in the fight that you had, the slap that occurred there? You did have a fight outside the apartment?

A Yeah, we argued.

Q He did slap you with his hand?

A I'm not sure, but I know we were arguing [374] pretty good. He usually did strike, you know.

Q Well, did you receive a scratch from Denny?

A I'm not sure. I just recall waking up the next morning and seeing it on my nose.

Q But this girl that Denny told you he got in a fight with, was a girl other than Patty; right?

A He told me he got in a fight with a guy, and the girl that was with him jumped on him.

Q And that was between the time that you went to bed at 1:30, and you woke up again at six or seven o'clock in the morning that that occurred?

A Yes.

Q Right?

A That is what he told me, yes.

Q And you don't recall any scratches on Denny, before you went to bed at 1:30?

A I never looked at him.

Q And you don't recall any?

A No.

MR. RICH: May I have a moment, please, Your Honor?

Q (By Mr. Rich) One last question. Does your brother have a problem with alcohol too, like you?

A When we were young, he went out drinking.

[375] Q Is he an alcoholic too?

A I wouldn't know. I am not to judge.

Q Have you been with him when he drank to excess?

A Yes.

Q How many occasions have you been with him where he drank to excess?

A Two or three times.

MR. RICH: I have no further questions.

MR. HANCOCK: Just a couple, with your permission.

REDIRECT EXAMINATION

BY MR. HANCOCK:

Q What would he do when he drank to excess?

A Everytime I was with him, he and I ended up fighting.

Q You said you don't recall, when you went to bed, the scratches on him; is that correct?

A Yes.

Q And you indicated you didn't look at him. Where was your head after he got back in the pick-up?

A In my lap still.

Q What were you doing at that time?

A Screaming.

Q And why were you screaming?

[376] A Because I didn't want to hear anything he had to say.

Q Now, Mr. Rich asked you about a statement you gave on January 8th, I believe, and January 9th; correct, where you made certain statements that you remember Patty was outside by the car when you left; is that correct?

A Yes.

Q And you indicated that you had attempted to black this out of your mind; is that correct, what had happened?

A I feel that's what happened. I remember sitting up. When I sat up, the next thing I said to him was "Take me to the beach."

Q And you didn't want to remember what happened; isn't that correct?

A Correct.

Q In fact, now besides the police, have you told anyone else that you were with Denny when he did this, and particularly, did you tell anyone in your family?

A I stated to my dad and sister when I got home that I felt I was there.

Q And when the police were talking to you, the more you talked about it, the more you remembered; [377] isn't that a fair statement, Gary?

A Yes, the more I talked, the more I started to deal with it, and these thoughts and these images I knew to be true, but couldn't explain.

Q And initially, you didn't want to tell the police about these images; isn't that correct?

A Yes, sir, because I couldn't put them in order. I didn't know where they were. What I knew, my face was in my hands leaving the bar, but I couldn't figure out why.

Q And now this isn't the first time you had told about what had happened; is that right?

A What?

Q You gave a full statement indicating what you remembered; isn't that correct, about Dennis outside telling you to get back in?

A Yes.

Q In fact, you indicated that the girl had begged for her life, didn't you?

A Yes.

Q And what were you doing, when she was begging for her life?

A All I remember is her yelling for him, and after I threw the stone, I got in the vehicle, after he told me to get back in the truck, and I put my face in [378] my hands and in my lap and just sat there.

Q In this first statement that Mr. Rich referred to, did you tell him about the fingernails that you saw the next day?

A Yes.

Q And you told him about certain items you had seen in the truck?

A Yes. In the first statement?

Q Yes.

A Yes.

Q And so it wasn't that you changed your other statements, it's just you started remembering more; is that correct?

MR. RICH: Your Honor, I'm just wondering if Mr. Hancock would like to get up there and testify. If he wants to take the oath, Your Honor, fine.

THE COURT: It was a question you asked.

Q (By Mr. Hancock) Now, you indicated that you had gone for some – and Mr. Rich referred to it as a psychiatric hospital. What type of hospital, what type of place, was it, Gary?

A It was – they had different words for different – they gave you evaluation tests before you [379] went in, and then put you to where they – you know, a ward that they felt would help you the most, and I was in the – I don't even know what they call it, but it was – I could leave the building any time I wanted. I just had to be back for the group therapy at certain hours. My psychologist was going to be there to talk to him.

Q He referred to it as you were committed. Were you ever committed to any –

A No.

Q And that was after this incident; correct?

A Yes.

Q Do you know how this incident, what you observed, how that has affected you?

A I have had a lot of problems at work because I would be working along, and I would be fine for months at a time, you know, and all of a sudden, things would start to come to me that would place me there, and I would have trouble dealing with it, and I would just sit

down and not get any work done because I was trying to figure out these little things that were coming to me.

Q It's been extremely difficult for you; is that correct?

A Yes.

[380] Q Now, Mr. Rich asked you if you were a suspect. Did the police ever tell you you were a suspect?

A No.

Q Did anyone ever tell you what to say?

A No.

Q And who, if anyone, told you just to tell what you remember, to tell the truth?

A You did.

Q How about the police officers?

A Yeah, they kept asking me about a forty-five minute time span that I couldn't account for in my statement.

Q And the more you thought about –

A I kept telling them-I was sleeping during that time.

Q And the more you thought about it, what happened?

A The more I thought about that forty-five minute time span, that they said I didn't know if I was accounting for it or not, but they told me that they had witnesses that say certain things, and that there is a forty-five minute time span that I am not dealing with, and they

wanted to know what I was doing during that forty-five minutes.

[381] Q And then there came a time when you gave a full statement indicating what you had done during the forty-five minutes?

A In dealing with this one thought that I never told them about, about my face being in my hands, in my lap, screaming, that I couldn't place. I never told them about that, until –

Q Was that before or after your brother was arrested?

A That I told them, or that I was dealing with it?

Q Well, I think you indicated you were dealing – when did you first tell them?

A I believe it was at the State Police Post in Iona, when they told me he was arrested, and I was sitting there, and I mentioned to him that for along time I had this thought and image that I couldn't explain, of my face being in my hands in my lap screaming at him, and I couldn't – and then all of a sudden, I mean it was like I vomited right there because all of a sudden, it just all – everything fell into place, the marks on his face, me screaming at him, throwing the stone. Throwing the stone came to me, and it all – I still haven't pieced to myself some things, but I don't have to understand, I just don't, and I'm [382] sorry, but I don't.

Q That's all right. Why don't you take a drink of water.

A It's not that. It's just dealing with this.

Q You feel somewhat responsible and guilty; is that correct?

A Well, of course. I couldn't stop him. I mean you know it's like jumping in icy water to save somebody from a plane wreck, or you know, what you are doing if you were there.

MR. RICH: Your Honor, can we take a brief recess?

MR. HANCOCK: I think that's all the questions I have, Your Honor.

MR. RICH: Well, I may have more. We'll take a brief recess.

MR. HANCOCK: Can I finish with mine?

Q (By Mr. Hancock) Now, you indicated that he was possibly moderately a little drunk; is that correct?

A Yeah.

Q Who was doing all of the driving that night?

A He always drove. He never let me drive. [383] One time he did. I think the second day I was there, he let me take the truck to the beach by myself once, but that was the only time.

Q Did he have any problem driving the vehicle?

A No, not that I recall.

MR. HANCOCK: Thank you very much, Gary.

RECROSS EXAMINATION

BY MR. RICH:

Q How would you know, you were so drunk, you couldn't tell, could you?

A I don't remember swerving around the road or anything.

Q But you were so drunk, you could really tell?

A Probably not.

MR. RICH: No further questions.

MR. HANCOCK: I have none. Thank you very much.

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[452] MR. HANCOCK: Yes, Your Honor. With your permission, we will call Captain Mark Schlein.

Thereupon, the State of Florida, further to maintain the issues on their part to be maintained, called as witness MARK SCHLEIN, who, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

THE CLERK: Please state your name and spell your last name.

THE WITNESS: Mark Schlein, S-c-h-l-e-i-n.

Q (By Mr. Hancock) What's your occupation, sir?

A I'm a captain with the Broward Sheriff's Office.

Q And how long have you been so employed there?

A This is my thirteenth year.

Q And what do your duties presently consist of with the Broward Sheriff's Office?

A I'm an executive assistant to the chief of staff.

Q Back in December of 1981 and January of 1982, what were your duties?

A I was in command of the Homicide Bureau of the Sheriff's Office.

[453] Q As a result, did you become involved in the disappearance of a young lady?

A Yes, I did.

Q Who was that young lady?

A Patricia Gifford.

Q When did you become involved?

A I first became involved in the homicide unit, when it was notified, I think the 2nd of January.

Q How did you become aware of it?

A As commander of homicide, it was my job to be aware of ongoing investigations, and we started looking into the matter, when we learned of the suspicious circumstances.

Q And what did you become aware of?

A Well, we learned that Patricia and her friend had visited the Banana Boat Lounge in Fort Lauderdale, and after that, Patricia had disappeared from the bar, and was not seen again, and after a day had passed, her friend was even more concerned, and we thought we had best look into it.

Q As a result, did you do anything personally in this case?

A I did. On January 6th, after the suspect in the case was identified – he was identified at that point as Dennis Paul Grant – we were able to locate [454] where he was living, and I visited his home in an attempt to locate him.

Q Where was that, sir?

A That was, strangely enough, just a couple of blocks from here, 665 Southwest Fourth Avenue.

Q Who was there, when you got there?

A Randy Eckman was the person living there at the time.

Q And what did you find out as a result of talking to him?

A Randy explained that –

MR. RICH: Objection, Your Honor, as to what Randy explained. That would be hearsay.

THE COURT: Sustained.

Q (By Mr. Hancock) As a result of what he explained to you, did you have occasion to look around the apartment?

A Not really. It was empty. The room that Dennis was in was completely empty.

Q What did you do after that?

A Basically nothing, personally, although our investigators, of course, were able to continue the investigation.

Q Did there come a time when you had occasion to put out a BOLO, be on the look out for [455] anything?

A Yes, we were.

Q What was that BOLO?

A We were able to identify that the suspect had fled the area in his employer's Datsun truck, so we were able to immediately put out a BOLO for the truck and the suspect.

Q And where did you put this BOLO for?

A We put it out nationwide.

Q Now, what happened to the case after that?

A The investigation continued with other investigators and next, of course, they were able to locate the brother.

Q Did you have any contact with anyone?

A No, other than my investigators.

Q Was there anyone else in this investigation that contacted you?

A Yes, the family, of course, as you would imagine, was very concerned. As a matter of fact, I will never forget the mom. She spent more time in my office than I did, really. She was there everyday. She was absolutely determined that the case would continue, and that it wouldn't lose interest, although technically, it was still a missing persons case.

Q What was her name?

[456] A Barbara Ryan, I believe.

Q Then there came a time later in the investigation when you learned something, years later; is that correct?

A Well, it wasn't years, Initially, I learned on the 22nd of January that the truck, which the suspect had fled Fort Lauderdale in had been located in Tampa, Florida, and we sent an investigator from the forensic team up there to process it.

Q When would that have been in January?

A January 22nd.

Q And what was the next thing that happened, that you became involved in, personally?

A We were advised – the Sheriff's Office learned, in May of 1986, I believe, that the suspect had been arrested up in Georgia, and we sent – I went up there.

Q Who did you go up there with?

A Sergeant Lauria.

Q What was your purpose in going up there for?

A I wanted to speak with the suspect and learn whatever I could about the disappearance of Patricia Gifford.

Q And when did you go up there, what date?

[457] A We flew up on May 28th, 1986.

Q Did you have occasion to come in contact with Mr. Sochor?

A Yes, I did.

Q What day was that?

A May 29th, the next day.

Q Where was that at?

A It was the interview room of Decalb County, Georgia, Sheriff's Office.

Q And when you initially talked to him, what name, if any, did he use?

A He was using a variety of names. The name he used with us was Michael Jacobs.

Q When he used that name, what did you tell him?

A Well, initially, for a long period, he would deny being Sochor and deny ever being in Fort Lauderdale, and we were – through the use of a photograph that we had obtained, that basically ended the denial phase, and he started to emerge.

Q When he admitted his name was, in fact, Sochor; is that correct?

A Yes.

Q And let me show you State's Exhibit 3 in evidence and ask you: Is that the photograph you [458] showed him?

A Yes.

Q Now, before you actually talked to him, did you go over anything with him?

A Yes.

Q What did you go over with him?

A The very first thing that we did was advise him of his constitutional rights.

Q Who did that?

A I did.

Q And how did you go about doing that?

A I used the standard Sheriff's Office rights warning form, which we read to the individual, as he reads it with us, then he initials after being explained each of his rights, and then signs the form.

Q Do you have the original with you today?

A Yes, I do.

MR. HANCOCK: May I have this marked, Your Honor?

THE COURT: Yes.

MR. RICH: Just move it in. We have –

THE COURT: What happened to the other one?

MR. HANCOCK: That was the copy.

THE COURT: Was that received or just [459] marked?

MR. RICH: They were received. I had no objection.

MR. HANCOCK: Maybe I will just keep this one then, if there is no problem.

MR. RICH: No, I don't care if you want to put the copy in.

MR. HANCOCK: I want to give this back to you.

MR. RICH: I don't think you can.

THE COURT: You can substitute.

MR. RICH: Let's substitute. Give me my copy back them.

THE COURT: It's the same number.

Q (By Mr. Hancock) After advising him of his rights, did you ask him if he understood his rights?

A Yes.

Q What did he indicate?

A He indicated that he did.

Q When did you first advise him of his rights? Is this in State's Exhibit 38 in evidence?

A Yes. Initially, it was at 9:10 in the morning, when I first met him.

Q After advising him of his rights, then you [460] talked to him; is that correct?

A Yes, we did.

Q Initially, after he admitted to being Sochor, did he still deny being in Fort Lauderdale?

A There was a short period of time, but basically, when he began to admit who he was, the story emerged that he was, in fact, living in Fort Lauderdale, that he had, what he described as problems with girls.

MR. RICH: Objection, Your Honor.

THE COURT: Overruled.

Q (By Mr. Hancock) Let me show you what's marked State's Exhibit FFF for identification and ask you to look at that and see if you recognize that.

A Yes, I do.

Q How do you recognize that?

A Well, I recognize the photograph of course, and those are my initials on the corner.

Q Is that when you talked to him on that day?

A Yes.

MR. RICH: No objection.

MR. HANCOCK: We move State's Exhibit FFF for identification to be introduced.

THE COURT: Maybe received.

[461] THE CLERK: Number 39, for the State.

Q (By Mr. Hancock) What happened after that?

A Well, the story basically emerged that –

Q Tell us what he said.

A He was living in Fort Lauderdale, and had a problem with women. Basically, it was an uncontrollable urge for sex that came over him. He couldn't control it on some occasions, and on this particular evening, New Year's Eve, he met Patricia Gifford at a bar in Fort Lauderdale, was able to get her into his pick-up truck, which was his employer's truck. She resisted his sexual advances, and he choked her to death.

Q Now, did you take an actual taped statement from him?

A Yes, I did.

Q Do you have the original with you today?

A I do.

Q May I have it? Did there come a time where you made a copy of the original?

A Yes, there did.

Q Do you have the copy with you?

A Yes, I do.

Q And whose voice is on this statement?

[462] A There would be three voices. There would be mine. There would be Dennis Sochor, and there would be Paul Lauria.

Q And looking at State's Exhibit GGG for identification, and I ask you if you recognize that?

A This is the original tape.

Q How about looking at this one, HHH?

MR. RICH: You can crack the seal, if you want to.

THE WITNESS: This is the duplicate that was made of the original.

Q (By Mr. Hancock) And why did you make a duplicate?

A I was asked by you to delete certain statements that were made.

Q Through order of the Court and stipulation, you took out certain portions that were not relevant to this case; is that correct?

A Yes.

Q And as a result, there is like a click, and then a click; is that right, where it was deleted?

A It's in there. It's hard to pick up, but there is a click, yeah. There are actually two sections.

MR. HANCOCK: Your Honor, at this time, [463] the State would respectfully ask State's Exhibit, the copy that was made by order of the Court, which would be HHH for identification, be introduced in evidence and played to the ladies and gentlemen of the jury.

MR. RICH: No objection.

THE COURT: All right, maybe received.

THE CLERK: State's 40.

Q (By Mr. Hancock) Can you come down and play it, if you would please?

MR. HANCOCK: Here is a courtesy copy I got for the Court.

(The following is a tape-recorded statement played in open Court, which portion of the record is not certified as to accuracy or content:)

"The following will be a tape recorded statement taken by Captain Mark Schlein of the Broward County Sheriff's Office. Statement is being taken in the Dekalb County Sheriff's Office interview room on Thursday, May 29th, 1986 and commences at approximately 1:35 p.m. on Thursday, May 29th, 1986. Statement is being taken in the presence of Detective Sergeant Paul Lauria of the Broward County Sheriff's Office, [464] and is being taken from the suspect Dennis M. Sochor, S-o-c-h-o-r.

Q Dennis, before I begin, let me just ask you to state your name, for the record, so we know who you are.

A I am Dennis M. Sochor.

Q And what is your date of birth?

A 2/25/52.

Q And what is your current address here in Atlanta?

A 315 Woodcreek Court, Roswell, Georgia.

Q Okay, and what is your social security number?

A 381-58-0738.

Q And where were you born?

A Lansing, Michigan.

Q Is there a phone at your home here in Woodcreek?

A No. We were going to be installed as soon as we could afford it, but at the present time, no.

Q I know we went over this at the very outset of our conversation, before we asked you any questions. I'd like to go over it with you [465] really, so the record is clear. Remember the form that we explained to you with your rights on it?

A Oh, yeah.

Q That you printed your name in up here?

A Yes.

Q And we went through the rights, which I'll again do very briefly. I told you that I'm a police officer, and before I ask you any questions, I want to advise you of

your rights under the law. Do you understand that I'm a police officer?

A Yes.

Q And did you write in yes?

A Yes.

Q I told you that you had the right to remain silent, that is you need not talk to me or answer any questions, if you do not want to, and you understand that, and you wrote in yes again?

A Yes.

Q I told you further that you have the right to talk to an attorney and have him here with you, before we ask you any questions. You [466] wrote in that you understood that?

A Yes.

Q And then I said if you cannot afford to obtain your own attorney, and you want an attorney, one will be appointed for you, before we ask you any questions, and you responded yes that you understood that?

A Yes.

Q I then said that if you decide to answer the questions now without an attorney present, you will still have the right to stop answering my questions at anytime, until you talk to an attorney, and you indicated you understood that by writing in the word yes?

A Yes.

Q And then I said knowing and understanding your rights as I have explained them to you, are you

willing to answer my questions without an attorney present, and again, you said yes?

A Yes.

Q Finally, we said should you talk to me. I indicated to you that anything that you said was going to be an official part of the record and could be introduced in a Court of Law [467] as evidence against you, do you understand that?

A Yes.

Q Did you then write your name in here again at the bottom, Dennis M. Sochor?

A Yes.

Q I believe you initially began to write in what, the word Michael?

A Yes.

Q Is that because you had sometimes used that name in the past?

A Yes.

Q Okay. Then we read this paragraph. I Dennis M. Sochor, have read this statement of my rights or have had it read to me, and I understand what my rights are. I am willing to make a statement and answer questions. I do not wish an attorney at this time. No threats or promises have been made to me. No pressure of any kind has been used against me, nor have I been tricked or fooled into giving this statement. I understand and know what I am doing. This statement will be used in a Court of Law against me. Do you understand all that?

A Yes.

SGT. LAURIA: Dennis, if you would we [468] want to get this as accurate as possible. If you would just speak up a little bit, so that it's recorded.

Q (By Capt. Schlein) Let's start at the beginning. When did you first get to Atlanta?

A Approximately two years ago.

Q And prior to coming to Atlanta, where were you living?

A In New Orleans, Louisiana.

Q And prior to New Orleans, where were you living?

A Fort Lauderdale.

Q I'd like to direct your thoughts to New Year's Eve in at about the time that you left Fort Lauderdale. This would have been in 1982, I believe, New Year's Eve, 1982. I want you to think back. Were you living in Fort Lauderdale at that time?

A Yes.

Q Whereabouts were you living?

A I was on the north part of town. I can't really remember the name of the street, but it was a rather nice apartment.

Q Were you sharing it with someone?

[469] A Yes.

Q What were the names of your roommate or roommates?

A I don't know. You mentioned them earlier. If you would of asked me before, I wouldn't of been able to remember, but it's Barry –

Q If you don't remember it, if you don't remember their names, all you have to do is say that.

A No, I didn't, before we were talking earlier.

Q Okay.

A But I –

Q You remembered their names earlier. Let me ask you this then; okay? Did there come a time around New Year's, when your brother came to visit you?

A Yes.

Q Can you describe that, when did he come?

A It was around New Years or the day or two days before I believe.

Q Okay. And he came visiting?

A Yes.

[470] Q Let's think back. Let's think back to New Year's with your brother down there and ask you if you remember going with him to a bar to celebrate New Year's Eve?

A Yes, I do.

Q Do you remember where this bar was located? Think, think now.

A It was on the west side of Fort Lauderdale, I believe.

Q Do you remember the name of the bar?

A I didn't, but I do now.

Q Oh, we haven't mentioned the name, but what name do you remember it as?

A This is difficult because –

Q Sure, I know it's difficult.

A I didn't –

Q I know it's difficult for you, and I appreciate your being honest with us. Do you remember the name of the bar?

A I didn't.

Q Do you remember it as you're sitting here now?

A Well, we discussed it earlier, so as you mentioned the name. It's familiar.

Q What's the name?

[471] A The name is Banana Boat.

Q Okay, why don't you describe what happened, as far as you can remember that night.

A Well, my –

Q Go ahead.

A My brother and I – do you mean at the bar or before the bar?

Q I just want you to be as honest with me now, as you were a few moments ago, before we turned the tape recorded on. You were at the bar. I guess you drove to the bar. What were you driving?

A Datsun pick-up truck.

Q And whose truck was that?

A It was my boss'.

Q And what kind of a business was it? Who did you work for at that time?

A I don't remember my boss' name.

Q Do you remember what kind of work you were doing for him?

A It was cleaning swimming pools.

Q Okay, and the truck was his?

A Yes.

Q Okay. What color was the truck?

A White.

[472] Q Pick-up truck?

A Yes.

Q So, you drove your brother to the bar. Do you remember that?

A Yes.

Q Describe what happened in the bar that evening, as you remember it.

A Well, we – we drank a lot of drinks, something I wasn't used to. It was the first time I drank in about a year-and-a-half, and I probably got – I know I probably – I got very well drunk, and we had been talking to several girls all through the night, I imagine. I know I was talking

to several girls. I don't know how many it was, and I know we were talking to the two girls you mentioned here.

Q Do you remember anything about the conversations?

A I don't know.

Q Okay. I'd like to show you the picture that was taken in the bar of you that night and ask you, of course, if you recognize the man in the picture?

A Yes.

Q That was the bar that you were at. [473] Do you recognize the girl? Think now.

A I remember a girl that was funny and happy sitting next to me. I can't remember the face.

Q And do you remember anything about the girl herself, or what she may have told you, or what you were talking about?

A I remember we discussed, you know, having sex and things like that.

Q And what was her attitude?

A I remember she told me she had a boyfriend, things like that.

Q Did she indicate where she was working, what she was doing down here?

A No, not that I can recall.

Q Did she indicate if she'd been down here for a long time or was new in the area?

A Possibly, but I don't remember, you know, much of the conversation.

Q Okay. She was alone, or she was with friends?

A She was with friends, I think.

Q What happened after you asked her to have sex, and she said no? What happened next?

A I remember my brother and I leaving [474] the bar, and I drove my brother to the apartment.

Q And then what happened?

A And I remember leaving the apartment by myself, and from there on, it gets hard for me to remember that day.

Q Did you drive back to the Banana Boat, after you dropped your brother off?

A I possibly could have. It's hard for me to recall.

Q And if you had driven back to the Banana Boat, would the girl and her friends still have been there?

A Possibly, yes.

Q Okay, what happens when a girl says no to you? What happens when you get that urge, as you described that something inside you says you need a woman, you need sex? What happens when that – the woman that you want says no? What does that do to you?

A It's hard to describe. It's like an inner charge builds up and builds up, up to a point of I have say no – no control. No mental control of anything, of anything.

Q You feel the need to force yourself [475] on the girl, do you? How would you describe it? What happens to your inside?

A Inside, that's – I'm trying to figure the word to put out.

Q Take your time.

A It's a great energy, energy feeling, just like if you ever been a fright or terrified or something, just a big build up.

Q And it's released when you force yourself on the girl?

A It's – you know, in the past, when it's happened, I guess I can't say it's satisfying or there is complete release. It's just charged up, and at the onslaught of the ones I do remember, it was a very guilt, very terrible feeling.

Q Do you remember anything happening that night?

A Other than drinking at the bar and talking and taking my brother home, I don't.

Q Well, you told me a few moments ago. What were you describing to me? Didn't you talk about a fight?

A Oh, yes.

Q Well, why don't you describe what [476] you remember about the fight that evening.

A In the morning when I woke, my brother told me that there was shoes and something – a purse in the car.

Q And when you got out, and you saw them in the car, what did you do?

A I got scared because knowing that the night before was one of those nights like when I awoke and didn't know what was going on and something might of happened.

Q Did you have the urge that evening?

A As I recall, yes.

Q And she also said no, she had a boyfriend?

A Yes, I believe so.

Q When you got up in the morning, and you saw the purse and the shoes in the car, what did you do? What did you think?

A I thought that there's a possibility that something happened, that had happened previously other times.

Q Meaning what?

A That I might of forced myself on another woman.

Q Did you notice anything about your [477] face in the morning?

A Yes.

Q What did you notice?

A There were scratches on it.

Q Okay, where did these scratches – what did you think might have happened? You found in the morning an unknown girl's purse and shoes in your car, your face was scratched, you had that urge that night before, she

said no. What did you think? What terrified you? What were you thinking? What did you think had happened?

A I had committed another rape possibly, probably.

Q As you sit here now, what do you think? What do you think you did to that girl, as you sit here right now talking to me?

A That I raped her, another girl.

Q What did you do with the purse and the shoes?

A I believe I discarded them in a trash can.

Q Did there come a time when you left Fort Lauderdale?

A Yes.

[478] Q Okay, when was that? What made you leave Fort Lauderdale?

A I saw my picture, and I believe my brother's picture and a girl.

Q All right, describe it now. Where did you see you picture?

A On television.

Q And you saw a girl's picture?

A Yes.

Q As you sit here now, do you remember what picture that you saw, what girl's picture you saw on television?

A I don't remember the picture, but as we were talking earlier, I know it would have been the picture of the girl we were talking to.

Q Think back now, when you saw the picture of the girl, when you saw it back then in early January, 1982, when you saw that picture on television. Did you recognize the girl as the girl you were talking to in the bar?

A Yes.

Q And you recognized your picture, of course.

A Yes.

Q And you were terrified, and what did [479] you do and why? Why were you terrified?

A I didn't recall what had happened, but I could only estimate that I had, in fact, committed another rape and was terrified of the fact, so I decided to leave town.

Q How did you leave town?

A I took my boss' truck.

Q The pick-up truck?

A Yes.

Q And where did you take it to?

A I took it to Tampa.

Q What did you do with it in Tampa?

A I discarded it someplace. I don't recall, just packed it and locked it and –

Q And left it?

A And left it.

Q Then where did you go from there?

A From there, I went to a bus station and went to New Orleans, Louisiana.

Q I'd just like to clear one minor point. When we talked earlier and the matter of the items in the truck came up, we had not given you any indication on that whatsoever, however, you brought up the fact there was a shoe in the truck; correct?

[480] A Yes.

Q And you said there was another article in the truck. That was the purse; right?

A I believe so.

Q But it could have been another article; is that correct?

A Yes, possibly. I can't recall.

Q So, you're sure about the shoe, and you're sure there was another article, but you're just not sure what that article is; correct?

A Yes.

Q Okay. May there have been more than a shoe and a purse in the car, in the truck?

A Possibly, yes.

Q Okay, whatever property was in there, besides a shoe or purse, whatever would have been there would have been discarded by you, thrown away?

A Yes.

Q Okay. Why do you think you do that kind of thing? Why do you think it is that you do this kind of thing, that you attack these girls? What causes it?

[481] A I only wish I knew. Cause if I knew, it would never happen. I – I don't, I don't know. I know I feel terrible and innerhurt when they have happened.

Q After you have done it to a girl, do you feel guilt?

A Yes.

Q Do you feel sorry for what you have done?

A Yes, tremendously sorry.

Q Well then, why do you do it?

A (no response.)

Q Have you felt the urges since this New Year's Eve in Fort Lauderdale with this girl?

A Yes.

Q Okay, I'd simply like to reflect for the record that side one of the tape has expired, and we are now flipping over to side two of the tape. It is now Thursday, May 29th, 1986 and the time is 2:06 p.m.

Dennis, just to clear up matters, for the record, after the tape expired, and I flipped it, have we discussed this case, while the tape was being changed?

[482] A No.

Q Okay, let's continue then. I asked you if you felt this urge, since that night in Fort Lauderdale, and what were you saying?

A Yes. I have dated several times. I can say that I haven't felt it as much because I – I don't drink too much, but I have noticed that at times when I do drink, the urge is, you know, more prevelant probably.

Q You think then that alcohol may somehow in some small way work to trigger this rage?

A Yes.

Q What have you done up here to fight the rage, to fight that thing that makes you do this kind of thing?

A I know my life is much more active. I play tennis, and I have just a lot of good friends and spend most of the time visiting and things like that.

Q Do you think you have this thing inside of you licked, or does it still scare you?

A It scares me because, you know, I have felt the urge, you know, at parties and [483] things like that, but somehow just some control came over me, where I know I have the strength that some control came over to stop me. It – I mean I felt it working up, but something somehow thank God somehow some control took over.

Q Thinking back to that night in Fort Lauderdale, you told us there were a lot of things that you don't remember. Is it unusual for you to wake up after one of these things have happened and be sort of in a fog? Has that happened to you in the past, so that you don't remember everything clearly?

A Yes.

Q Does that happen? What causes this lack of memory, do you think? Do you think it might be guilt?

A Probably.

Q Do you think it might be because you just don't want to remember it?

A That's difficult to answer, not – I am not sure what it is. I don't know if you understand, but –

Q Yeah.

A I don't understand, so I think it's the guilt part of blocking it out, but that's [484] not me.

Q In other words, you don't want to admit to yourself that it's you that's doing this?

A Yes, I don't – I don't associate myself with doing it, although I am aware that it has been done, if that makes any sense.

Q Sort of like you feel – you feel that something inside you is doing it, but you can sort of separate that from you?

A Exactly. That's – that's it totally. I cannot associate myself with that action.

Q Don't you feel frightened or terrified by this whole thing, this whole rage that builds up inside you that makes you do these things, this thing to girls? Doesn't that scare you?

A Yes. It's not that I go out thinking that something might happen. It's just when I feel it starting to take place and in the situations I've been able to control, that's when I'm the most terrified, you know, that it could of taken place again, I guess.

But it's not something that I walk around [485] and – I fear certain times it's not just sexual. It's other times. it's like I play tennis, and I've been playing a lot of tennis and on certain calls where the ball might of hit the outside line, and I felt it hit the line, and I was called out, and I get sometimes quite upset and sort of lose maybe control of my emotions, which I try to be very easygoing.

Q You know your brother has described to us the actual abduction and rape. Can you think of any reason why he would be lying to the police?

A No.

Q Okay. Let me ask you this: Have you given into this rage? Have you attacked any other women that I'm not aware of?

A No.

Q Since you have been up here in Atlanta, for example, in this area, have you attacked any other women?

A No, I haven't

Q How can you be sure?

A I haven't dated much, and its somehow, usually I know when I have done it, after it's finished. During it, I am not aware [486] of it, but after it's over, then I'm aware of it.

Q You have that feeling that you have done something bad?

A Yes, or in fact, yes, I have.

Q Was that the feeling that you wake up with that morning in Fort Lauderdale?

A Yes.

Q That terrified you, when you saw the scratches on your face?

A Yes.

Q That terrified you, when you saw the girl's property in your truck?

A Yes.

Q And that triggered you to run like heck, when you saw her picture on TV?

A Yes.

Q Is there anything that you want to add at this point?

A I guess I can only add that apparently with what has happened, I am guilty of.

Q If you had to say anything to Patty's mother, what would you say to her?

A I would say if God could give me the [487] power to bring her back, I would, or if I could take my life in place of hers, I would. That – I don't know if it were my daughter, how I could forgive a person.

Q If it were your daughter what?

A How I could forgive a person. I don't know what to say. I'm so deeply sorry, somehow that just isn't enough. I can never cry enough tears for the hurt and pain I have caused.

Q Do you think you could take me to where you placed her body?

A I don't –

Q And put her to rest?

A I am not sure because I don't recall the evening.

Q Do you think you'd be able to find the place where you placed her body in Fort Lauderdale?

A I just – if I could recall, I will. At this time, I don't know.

Q Was it in Fort Lauderdale, or was it up where you left the truck that you left the body?

A I know it wasn't where I left the [488] truck because when I left, I was very sober, and I recall there was just me.

Q I'd like to indicate that I'm gonna just initial the bottom righthand corner of the bar photograph with Dennis and the victim Patty, put my initials MHS in the lower righthand corner. I'd like Sergeant Lauria to put it there also. Sergeant Lauria, is there anything else that you'd like to add?

SGT. LAURIA: I'd like Dennis to place his initials here, also.

Q (By Capt. Schlein) Yeah, just initial right by Sergeant Lauria's initials there, if you would. Okay, reflecting that he again started to write Michael, I believe, the initial M, and he placed his initials DS under Paul's initials. Is there anything that you want to add, Dennis, before I complete this statement?

A I guess we were discussing earlier, I'm somehow grateful that, you know, I have been found and that possibly that – I know that I want this problem I have to be taken care of. I have tried to lead a good life and help you people ever since I left Fort Lauderdale, and I [489] want to continue doing that the rest of my life.

Q Dennis, let me just ask you this: Since we met you today, have we, Paul or I, mistreated you in any form or fashion, or have we treated you fairly?

A Yes, you have.

Q Have we treated you like a man?

A Yes.

Q Have we mistreated you in anyway?

A No.

Q In fact, you have had your coffee and lunch and been allowed to go to the restroom whenever necessary?

A Yes.

Q Does that basically tell the story, Dennis?

A Yes, it does.

Q Paul?

At this point, I'd like to complete this statement. It's Thursday, May 29th, 1986. The time is now 2:19 p.m. in the afternoon."

(Thereupon, the tape-recorded portion concluded.)

Q (By Mr. Hancock) Thank you. Now, it indicates on the copy that, in fact, side two was [490] turned over?

A Yes.

Q Now, can you explain that?

A Yes, sir. The original tape that we made in Georgia was a similar tape, and the original side one expired, and at that point, what we do is manually change it, flip it over in the recorder. What we did when we made the duplicate at the Court's request, it was on a forty-five minute side, so we played the entire tape, minus deletions, on one side.

Q Now, I hear in the original, there is a little sound, like this (indicating), like that. What's that sound?

A As I remember now – I didn't pick it up then – I think Dennis – I think Dennis or Paul was clicking a pencil, and I wasn't focused on it, but I definitely heard it now. I think it's a pencil clicking, and it's a lot louder with the microphone that close.

Q Now, after he gave that statement, what if anything did you do?

A We then flew back to Fort Lauderdale that evening and –

Q Who flew back to Fort Lauderdale?

A Dennis, Paul, and me.

[491] Q And what happened, when you got back to Fort Lauderdale?

A I drove him by the Banana Boat Bar, where this happened, and we did a walk-through of the parking lot, and he became very emotional, as he did at the end of the statement, and basically at that point, came out with the

words "Oh, God," or "Oh, God, I killed her. I choked her," or words to that effect, and at that point, I went back to our office at the Sheriff's Office with Paul and Dennis, and we took a second statement.

Q And State's Exhibit 38 in evidence, did you go over another rights form with him at that point?

A There is a second statement. We readvised him of his rights at the beginning of the second statement. I don't know if you have that one. You have the original and this duplicate, and then there is a second statement, which I have here.

Q How long was that statement?

A Approximately twenty or twenty-five minutes, as I remember. It was clear to Paul and I, after we left Georgia, that he wasn't telling us the whole story. It was a beginning, but clearly, there was a lot he was holding back.

Q As a result, that's why you took him by [492] the Banana Boat; is that correct?

A It was hopefully something that would serve as a catalyst to get the rest of the story out, and in fact, it did help because he became very emotional.

Q And whose voices are on this tape?

A The same three people, Paul, myself and Dennis.

Q And let me show you States Exhibit III for identification and ask you if you recognize that?

A Yes.

Q Is that the original?

A This is the original tape number two.

MR. HANCOCK: Your Honor, at this time, the State would respectfully ask that this be introduced into evidence, State's III.

MR. RICH: No objection.

THE COURT: Received.

THE CLERK: State's forty-one.

MR. HANCOCK: Would the Court want us to start playing the tape? It's about a twenty/twenty-five minute statement, or would you want to recess for lunch?

THE COURT: No, let's go ahead.

Q (By Mr. Hancock) With permission of Judge [493] Seay, would you come down and play this, please?

(The following is a tape-recorded statement played in open Court, which portion of the record is not certified as to accuracy or content:)

"CAPT. SCHLEIN: I'd like to reflect for the record that it is now 11:29 p.m., Thursday, May 29th, 1986. Location is the Broward County Sheriff's Office, Administrative Office Interview Room. Present are myself, Captain Mark Schlein, Detective Sergeant Paul Lauria, both of us of the Broward County Sheriff's Office, and we're speaking with the suspect Dennis Sochor. This will be a continuation of the interview that we conducted with Dennis earlier today.

Q Before we begin, Dennis, I'd like to very briefly – I know you've heard these rights given to you by me two

times already today. I want to go over them one more time real quickly. You understand that both Paul and myself are police officers?

A Yes.

Q You understand that you have the right to remain silent, that is you need not [494] talk to me or answer any of my questions, if you do not want to? Do you understand that?

A Yes.

Q That you have the right to talk to an attorney and have him here with you, before we ask you any questions. Do you understand that also?

A Yes.

Q That if you cannot afford to retain your own attorney, and you want an attorney, one will be appointed for you free of charge. Do you understand that?

A Yes.

Q If you decide to answer my questions now without an attorney present, you will still have the right to stop answering my questions at anytime, until you talk to an attorney. Do you understand that?

A Yes.

Q Knowing and understanding your rights as I have explained them to you, are you willing to speak to me now without an attorney being present?

A Yes.

Q You understand that everything that [495] you're saying is being tape recorded and your answers to my

questions will be introduced as evidence in a Court of Law against you, do you understand that?

A Yes.

Q Have we in anyway, shape or form mistreated you, pressured you, or made you any promises of any kind?

A No.

Q Have we treated you fairly?

A Yes.

Q Are you making this statement of your own free will?

A Yes.

Q I'd like to reflect for the record that upon landing in Fort Lauderdale, we drove first to your apartment, where you were living while you were in Fort Lauderdale; is that correct?

A Yes.

Q That's the apartment near the Broward County Courthouse?

A Yes.

Q And from there, following directions given by you, we wound up at the Banana Boat on [496] State Road 84; is that correct?

A Yes.

Q That was, in fact, the Banana Boat Lounge that you visited that evening on New Year's Eve; is that correct?

A Yes.

Q Now, while you were walking around the Banana Boat Lounge and parking area with us, you remembered some very important things about this case, didn't you?

A Yes.

Q I'd like to go over them with you now. Do you remember speaking with that girl, Patty?

A Yes.

Q Now, where was it that you remember speaking with her?

A At the bar.

Q Okay, did there come a time throughout the evening that you were speaking with her? You were in the bar speaking with her?

A Yes.

Q And what basically were you saying to her?

[497] A I don't really recall the conversation, but we talked about everything.

Q Well, what were you – what were you asking basically? What did you want?

A Friendship.

Q Did there come a time when you spoke to her in tne parking lot?

A Yes.

Q Describe where you were when you spoke to her in the parking lot. This was, I guess, early that morning?

A Yes.

Q Was it before or after New Year's?

A After.

Q Where were you in the parking lot when you spoke to her?

A I was in the back, in the truck.

Q You were in the truck that we described earlier?

A Yes.

Q That you worked for, the company that you worked for?

A Yes.

Q Now, this is the front or rear parking lot, where you were talking with her?

[498] A Rear.

Q What did you say to her?

A I said would she like to come in and talk.

Q And what did she say?

A Yes.

Q So, did she get – what did she do after she said yes? Where did she get into?

A On the passenger side.

Q You were sitting in the truck, and she was sitting in the truck?

A Yes.

Q Where were you sitting in the truck?

A On the driver's side.

Q Where was she sitting?

A Passenger's.

Q What did you say next? What happened next?

A And we talked –

Q You'll have to speak up a little bit. I know this is –

SGT. LAURIA: Dennis, do you think that you could perhaps go through it, you know, on your own?

MR. SOCHOR: No, no.

[499] Q (By Capt. Schlein) Just listen to me. You were sitting in the truck, and she was sitting in the truck. Could you tell me what you said to her at that point?

A I remember we kissed a few times, and I just started getting stimulated.

Q What did you feel like?

A Like having sex.

Q Have you felt that way before?

A Yes.

Q And when you felt that way before with a girl, what happened?

A Well, not everytime, but some uncontrollable feeling took over.

Q What happened next?

A There was an argument.

Q About what?

A Having sex.

Q Did you ask her – did you want sex?

A Yes.

Q Well, what was she saying?

A No.

Q Describe what happened next.

A And I grabbed her.

Q Tell me what happened.

[500] A And then she hit me and –

Q Where did you grab her?

A I'm not sure, the hair or something, I don't know.

Q What was she doing?

A She started hitting me and –

Q What else was she doing?

A And started screaming.

Q Go on.

A I panicked, and I think she scratched me and –

Q What happened after she was hitting you and scratching you, go on. What happened next? What did you do?

A I think I got angry and began choking her.

Q While you were choking her, what was she doing?

A Fighting.

Q Go on.

A And then she didn't move.

Q What happened next?

A Then I didn't see her move, and I got scared.

Q What were you scared of?

[501] A Of what had just happened.

Q What did you think had just happened? What did you just do?

A I probably just murdered her.

Q When you looked at her, was she breathing?

A No.

Q What were you thinking?

A I just killed her.

Q What did you do next?

A I drove off.

Q What were you thinking?

A I don't recall. I could not believe what had just happened. I was just terrified.

Q What happens next?

A I drove and drove somewhere, and I took her out and laid her down somewhere in the bushes.

Q Could you describe what the area looked like?

A There were some houses along the road and a tree.

Q Did you conceal her in any fashion? Did you hide her body?

A I may have covered her in a blanket, [502] maybe. I don't really recall. I think I did, though.

Q You think you covered her with a blanket?

A Yes.

Q Did you have sex with her?

A No.

Q Why didn't you? Isn't that what started this whole thing?

A Yes.

Q Why didn't you have sex with her?

A Cause I thought I had just killed her.

Q Why didn't you have sex with her?

A Cause I believed she was dead.

Q Describe the area where you put her on the ground?

A It was a road. I don't know if it had an end, and there was bushes and trees on the side.

Q Was it cement? Was it grass? Was it woods? How would you describe it?

A Grassy and dirt road.

Q When she was on the ground, was she covered with anything?

[503] A I believe a blanket.

Q And how far was she from the main roadway?

A I'm not sure how far.

Q You carried her?

A No, I drove down the road.

Q How far did you drive down the road from the main road, to the point where it was that you stopped?

A It was a thousand, two thousand feet.

Q Was the road that you were on at that point paved or dirt?

A It was dirt, I believe.

Q What happened when you actually stopped the truck on that dirt road, what did you do next?

A I got out and placed her body in the weeds.

Q You got out of the truck, then what did you do?

A I placed her body in the weeds.

Q Was she heavy?

A Yes.

Q How far from the truck did you carry [504] her?

A I don't think it was too far, twenty feet maybe.

Q And you put her in some weeds, you said?

A Yes.

Q Did you cover her at that point with anything?

A I believe a blanket.

Q What happens next?

A I –

Q What were you thinking?

A I really don't know what I was thinking.

Q What did you do next?

A I believe I started crying on my way home.

Q Did you tell anyone what you had done?

A No.

Q The next morning when you got up, what did you find in the truck?

A A shoe and a set of keys.

Q Was there anything unusual about the keys?

[505] A There was something on it. I can't recall what.

Q Who did the keys belong to?

A I didn't know at the time.

Q Who did the shoe belong to?

A The girl I murdered.

Q And what did you do with the property, the keys and the shoe that you found in the truck?

A Placed it in the dumpster.

Q How did you feel about what you had done? You had just killed a girl, how did you feel about that?

A Terrified, shocked.

Q You had just done something horrible. What did you do? What did you do next?

A I don't recall the next day. I just don't know what happened the next day.

Q When you saw the girl's picture on the television, what did you think?

A I got terrified. I got in my boss' truck and drove.

Q Did you have any permission to take that truck anywhere?

[506] A Other than that was my personal truck to use.

Q Did you have permission to take it where you took it?

A No, I didn't.

Q Where did you take it?

A To Tampa Bay.

Q And that is where you left it, as you described earlier?

A Yes.

Q As you sit here right now, are you willing to help us try to locate the body of the girl you killed?

A Yes.

Q Will you work with us to see if we can find that body?

A Yes, I will.

Q Is there anything that you want to add to this statement? Is there anything that I haven't asked you that you want to tell me?

A I am so sorry. This is the hardest thing I've ever had to live with in my life. I sure wish it wasn't anything I had to live with, and if I had any control, it wouldn't be anything I had to live with. It is something [507] I'll never live with again.

Q Isn't it something that you knew you had within you and inside you for a long time?

A Yes, it's forgotten.

Q Is there anything else that you want to add?

A I'm so very sorry.

CAPT. SCHLEIN: Sergeant Lauria, is there anything that you want to add?

SGT. LAURIA: No.

Q (By Capt. Schlein) Dennis, does that about tell the story?

A Yes.

CAPT. SCHLEIN: At this time, I'll be completing this continued statement. The time is now 11:47 p.m., Thursday, May 29th, 1986."

(Thereupon, the tape-recorded portion was concluded.)

Q (By Mr. Hancock) Thank you. Did there come a time that you had occasion to take him out and look for the body?

A Yes.

Q And when was that?

A I believe it was the day after next, and Dennis, Paul and I drove out to various parts of [508] Southwest Broward County trying to find the body.

Q Where did he indicate that the killing had occurred, what County and State?

A Southwest Broward County, Fort Lauderdale, Florida.

Q And he described the area; is that correct?

A Yeah, he described it in the same fashion as his brother had. It was – we were trying to get specifics, but it came out as a paved road leading to a dirt access road leading to a grassy area, and we were looking for some piping and some culverts. Unfortunately, the way it looked in 1982 and the way it looked in 1986 – it was like a different world. What was under construction at that time, dramatically, if not completely, developed, Bonaventure, I-75. There's a whole development out there, and we couldn't find anything that looked the same to him.

Q Did there come a time where you had occasion to take another statement from Dennis?

A Yes.

Q When was that, Captain?

A June 1st, I believe.

Q Did you have occasion to go over anything with him at that time?

[509] A Yes, same procedure. We readvised him of his rights in the hopes that –

Q Let me show you State's Exhibit EEE for identification. Do you recognize that?

A Yes.

Q Those are the rights you went over with him again?

A This is a photocopy.

Q You have the original; right?

A Yes, I do.

Q May I have the original now? Thank you.

MR. RICH: You want to substitute that?

MR. HANCOCK: We ask that this be introduced. This hasn't been introduced yet, your Honor, EEE.

MR. RICH: No objection, Your Honor, for substituting for the copy.

THE COURT: It's not in evidence?

MR. HANCOCK: No, it's not in yet.

MR. RICH: The original isn't, but my copy is.

MR. HANCOCK: No, it's just been marked, but we've just introduced it now.

MR. RICH: No objection.

THE CLERK: State's 42.

[510] Q (By Mr. Hancock) Now, why did you take another statement from Dennis Sochor?

A Because frankly, I wasn't convinced he was telling me the whole truth, and in situations like this, as the truth begins to emerge, you can sometimes learn more about it, as the days pass. In this particular case though, we were satisfied that this wasn't the whole story.

Q And therefore, then you took a third statement; is that correct?

A Yes.

Q Do you have that with you today?

A Yes.

Q May I have that, please? Thank you. And whose voice is on this?

A Same. It would be Paul, Dennis, and I again. Nothing new emerged on that statement.

Q Approximately how long is this statement?

A I think it's about the same size, fifteen minutes. I can't really recall.

Q Look at state's Exhibit JJJ for identification ask you if that's the original of the tape.

A Yes.

MR. HANCOCK: Your Honor, at this time, we [511] respectfully ask this be introduced and played to the ladies and gentlemen of the jury.

MR. RICH: No objection, Your Honor.

THE COURT: Maybe [sic] received.

THE CLERK: State's 43.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content:)

"CAPT. SCHLEIN: The following will be a tape recorded statement taken by Captain Mark Schlein of the Broward County Sheriff's Office on June 1st, 1986, commencing at approximately 3:35 p.m. in the afternoon. We're at the Broward County Sheriff's Office interview room in the Administrative Building. This statement is being taken in the presence of Detective Sergeant Paul Lauria and is being taken from the suspect Dennis Michael Sochor.

Q Now, before we begin, I know you had your rights read to you by me several times already, but I want to make it clear for the record that we have just done that again.

Dennis, do you understand that Paul and I are both police officers?

[512] A Yes.

Q Do you understand that you have the right to remain silent, that is you need not talk to me or answer any questions, if you do not want to. Do you understand that?

A Yes.

Q That you have the right to talk to an attorney and have him here with you before we ask you any questions. Do you understand that?

A Yes.

Q If you cannot afford to retain your own attorney, and you want an attorney, one will be appointed for you, before we ask you any questions. Do you understand that?

A Yes.

Q If you decide to answer the questions now, without an attorney present, you will still have the right to stop answering my questions at anytime, until you talk to an attorney. Do you understand that?

A Yes.

Q Knowing and understanding your rights, as I have explained them to you, are you willing to answer my questions without an attorney present?

[513] A Yes.

Q You are aware that anything you might answer to my questions will be tape recorded and can be introduced in a Court of Law against you. Do you understand that?

A Yes.

Q Did you print your name here?

A Yes, I did.

Q And then signed your name there?

A Yes.

Q After reading this paragraph – I have read the statement of my rights or have had it read to me, and I understand what my rights are. I'm willing to make a statement and answer questions. I do not wish an attorney at this time. No threats or promises have been made to me. No pressure of any kind has been used against me, nor have I been tricked or fooled into giving this statement. I understand and know what I am doing. This statement will be used in a Court of Law against me. Do you understand all that?

A Yes.

Q What I'd like to do now is bring your attention back to that New Year's Eve that [514] actually became January 1, 1982 at that Banana Boat. Starting there, trace back some of the steps that happened that evening. First of all, when you arrived at the Banana Boat on the New Year's Eve, were you alone or did you come with someone else?

A I came with my brother. My brother came with me.

Q Okay, in your own words, why don't you describe how that evening went, once you arrived at the Banana Boat with him.

A I guess it went as most any other evening would go when you're out with someone drinking, except that I

haven't drank for a year and a half, but outside of that, we sat down and talked most of the night.

Q There came a time when you met a couple of girls?

A Yes.

Q Now, did you recognize one of the girls from the photograph that you saw on television? In other words, you spent the evening talking with some girls; right? What were you talking about?

A Anything and everything, anything, [515] just you know – I don't know.

Q Can you remember?

A I can't remember the conversation. I do remember talking all night long.

Q You were speaking with them. How long would you saw [sic] you were talking with those two girls?

A Three, four, five hours.

Q So, it was a long, most of the evening?

A Yes.

Q Of course, one of those two girls was the girl that you eventually had the fight with?

A Yes.

Q And the other was her friend?

A Yes.

Q Did you at some point that evening leave the bar before the evening was through?

A Yes, at one point.

Q Did you leave alone, or did you leave with someone? Describe what happened.

A I don't know exactly how – I can't remember exactly how we said or what happened, but I remember taking my brother with me, when I [516] left.

Q So, there was a point when you left the bar with your brother?

A Yes.

Q Do you remember where you went with your brother?

A Well, I can't remember exactly where I took him, but I know he wanted something, to party more or something in the night, I think. I'm quite sure I took him maybe to the A1A strip.

Q To the beach area strip?

A Yes.

Q Okay, at that point, what, you left your brother out there?

A Yes.

Q And what did you do?

A I believe I was going to head into home, but instead, I went – I think I went back – I know I went back to the Banana Boat.

Q Did you have any reason for going back to the Banana Boat?

A Other than the fun I had and to talk more with the girls, I suppose.

Q When you got back, where were the [517] girls that you had been talking to earlier?

A They were in the back of the restaurant.

Q Okay, what do you remember about them, when you saw them? Were they both together? What do you remember when you came back in there?

A The one girl was standing beside the car, I believe.

Q Beside her car?

A Yes.

Q Do you remember what it was?

A No, I don't.

Q Where was her friend?

A If I recall, she was laying in the seat or something.

Q She was in the car?

A Yes.

Q Laying in the car. Okay, what did you say to –

A Can I say something?

Q Sure.

A A lot – some of the things that we talked about, first of all, I have to clarify I was very drunk that night. So just to sit down [518] and say what has happened, I

wouldn't be able to recall it as we went over things. I can see now that yes, these things did happen the way we are discussing, but just to sit down, and I wouldn't of been able to do it, but I'm not saying what is not, what we're talking about – yes, these things did happen as we're talking about them. It's just my recollection of them isn't as, you know, perfect as what it may sound right now.

Q Okay. When you – when you saw the girl beside the car, what did you say to her?

A I think I asked her if she wanted to sit in and talk, get in the truck and talk.

Q Do you have some doubt if you invited her into the truck? I'm trying to understand what you've said. You've already explained to us –

A The conversation is difficult.

Q There is no doubt in your mind that you invited her into your truck?

A I'm not sure if I just pulled in, and she got in, or if I said, I can't –

Q Okay, I understand what you've saying.

A I can't recall.

[519] Q But she got into your truck?

A Yes. At any rate, I do know that she did get in the truck.

Q You're sure about that?

A Yes.

Q Now, when you were back in the back of the Banana Boat parking lot, and she was in your truck, were there other people around that you noticed?

A No.

Q What happened after she got into your truck?

A We talked for – I don't know. I couldn't say how long.

Q And then?

A Do we have to go through –

Q Just briefly, I know you already told us what happened, but I think it's important that we understand what you were feeling. You indicated that you'd been drinking?

A I mean it's pretty rough. We talked for I don't know how long, and I know we kissed a few times. and the rest is difficult. It's just so hard for me.

[520] Q I know it's difficult. What happened after you kissed a few times?

A Being drunk, I get – there is points where I don't have as good a control as I would normally have not being drunk.

Q Was this one of those times?

A Yes, it was.

Q What did you do?

A I wanted to have sex with the girl.

Q And what did she say and do?

A I believe she said no, and I kept being persistent, and I think she probably yelled at me and something and made my emotion stronger.

Q What did you do?

A I believe I grabbed at her.

Q Was she fighting with you?

A Yes. When I grabbed at her, she started fighting and maybe hit me, and I think that angered me more, and you know the rest.

Q It was at that point that – did she hit you, or did she do something else, also?

A Well, she hit me, and we discussed scratch marks, although right now, I don't remember them. I'm sure, you know, it happened.

[521] Q You didn't get scratched?

A I probably did because from what I understand, everybody said I was scratched.

Q You don't remember seeing scratch marks on your face the next day?

A At this date, I don't.

Q Okay.

A There's so many things foggy, you know, about the night. Some things are very clear, and some things are very foggy.

Q Are you foggy about choking her?

A No, I am not.

Q Are you sure that you choked her?

A Yes.

Q And after you finished, what happened, after you choked her in the truck?

A I was terrified that I may have just killed her, and I didn't hear any movement or breathing, and I was quite sure I had, and so I took off to find a place to lay her.

Q I want to clarify one thing. For the past two days, you have been trying to help us locate the body; is that a fair statement?

A Yes.

Q Why is it important for you right [522] now to try and find her?

A Because when the police found me, I thought that they must of already found the body and having talked to you, I understand that they haven't, and if I was died and put down someplace, I guess my parents would want my remains home, and I guess that's the biggest reason.

Q Basicaliy then you'd like to find her to make it a little bit easier on her parents?

A Yes.

Q We haven't been able to locate the body. Can you try to explain why you're having such a hard time finding her?

A We've been driving and driving, and we just can't seem to locate anything that looks familiar, as there is a lot of construction in the area.

Q To pin it down as closely as we can, when you left the Banana Boat, do you remember what road you took at that point? I mean whether you were heading north or south, whether you were on a highway or not a highway? Do you remember what road you took from the Banana [523] Boat?

A I believe I was heading south on 95, not so much as I remember the drive, as I feel coming back, I remember the highway and traveling north.

Q So, you think you took I-95 south?

A I believe so.

A Do you have any recollection of how far south you were going?

A None too much, except I can say we were from fifteen to twenty minutes, possibly. Possibly, it's very hard.

Q There came a time when you exited from I-95?

A Yes.

Q Do you remember if you turned left or right?

A I believe I turned right.

Q What kind of a road was that that you turned on to?

A It was a highway. I believe it was a two-lane highway.

Q One lane in each direction?

A Yes.

Q And did you take a short or a long [524] ride on that highway that you turned off on?

A I think it was a long ride.

Q Could you estimate it in time as to how far you would have gone, how long you would have been driving on that road?

A I would say maybe twenty minutes to a half hour, possibly.

Q Now, when did you leave that roadway? Describe the kind of a road or what you did when you left that road, what you saw.

A Possibly there was a canal or something in the right or left, and there was a short turn to the right on this road.

Q Was the road that you made the right turn on to paved or unpaved?

A It was paved, I think.

Q Was it a multi-lane road or a two lane road, or how would you describe it?

A I believe a two-lane road.

Q What happened next? You made the right turn on to this road. How far did you take it?

A I would say no more than three quarters of a mile.

Q And then what happened?

[525] A And then there was a dirt – I don't know if it was a road or a dead-end path or a dead-end gravel –

something excavated on the left, and I turned down that road to the left.

Q That was unpaved, though?

A Yes.

Q And you don't remember if it actually had a road sign, or it might have been just a dirt path or an unpaved path? How far did you take that path?

A Six hundred feet, maybe.

Q At that point, what happened?

A I stopped and got out of the truck and laid the body on the right side.

Q Did you lay the body on the left side of the truck or the right side of the truck?

A On the right side.

Q And how far from the truck was the body?

A Fifteen, twenty feet.

Q Describe the location itself where you put the body down, in terms of what it looked like to you.

A There was some type of a building to [526] the front of the truck, which makes me believe that it was a dead-end road.

Q When you say a building –

A Some type of small structure, concrete, I believe. It was just hard to tell. It was dark, and it was still quite a ways up yet.

Q Okay.

A Maybe eight hundred thousand feet up ahead of me.

Q Well, wait a minute now. How many feet did you say?

A Eight hundred or more feet.

Q Okay, I got you, eight hundred or a thousand. I hear you. So, it was in the distance?

A But it was up in the distance.

Q What about the area itself, where you placed the girl?

A It was grssy [sic] to the right, and to the left, I believe it was just slightly grassy pasture land type ground.

Q Were there – there were no lights or anything around?

A It seems like I could see lights to [527] the left, but to the right was kind of a woods. On the right side was woods, and the left was quite open.

Q Were you able to turn the truck around, make a U-turn or what? Was the path big enough to turn around in?

A I believe, yes. I just turned around, drove around, going to the left of me, just turned around, I believe.

Q I would like to clear up one point. When this incident happened with Patty, when you were in the parking lot, and she was in the truck, and the fight

started, and she struck out at you, and you wound up choking her, when this happened, was your brother with you?

A No, he was not.

Q So, your brother was not present when you killed the girl?

A No.

Q Did you ever tell him about your killing the girl?

A I did not.

Q So, he didn't really – he wasn't there to see it, and you didn't actually tell him about it?

[528] A True.

Q When you left the Banana Boat, at that time, where was Patty? We know that she was possibly dead at that point, but was she in the truck, or where was she at that point?

A She was inside the truck.

Q Basically, I guess where she entered, on the passenger's side?

A Yes.

Q Did there come a time when you moved her from the front to the back?

A No.

Q So, the only time that you moved her was when you took her out of the truck at that location, when you finally put her on the ground?

A Yes.

Q I remember when we talked the other day. You indicated that you covered her with something. What was that you covered her with? Do you remember?

A Possibly a blanket. I'm not real sure.

Q Was it already in the truck?

A Yes.

[529] Q Yeah, go ahead. I'm sorry.

A I keep a blanket always in the truck because I was from the north, and it's just habit because sometimes it gets cold, and you get – and you get – sometimes you freeze. Also, I used to go to the beach a lot, and it was like a beach thing. I would lay out in the sand on it.

Q Did you bleed at all from any of the scratch marks that she gave you?

A I can't recall.

Q Did she bleed at all, as far you know?

A No, none.

Q Basically then, if you had to describe how it was that she died, what would have caused her death, as far as you can tell?

A I would say choking, that's all.

Q Choking her?

A That's all it would be.

Q Okay. Did she say anything to you?

A I don't recall. The state I was in it's taken a lot to recall what we discussed so far.

Q You weren't taking any drugs though [530] were you?

A Other than the alcohol, which we'd been drinking for three, four, five hours, no.

Q When you came back to the bar, did you have any plan or goal? Did you have any idea what you were going to be doing?

A No, I was just, just out driving drunk, and I remembered the people we had a lot of fun with all night. I guess I decided to go back for more.

Q Let me ask you this: It's been almost five years since you killed the girl. How have you been able to live with yourself? Has it bothered you? I mean has it bothered you that you did this thing?

A It did for a long time. I cried many nights wondering what I had done because I know that's something that – that I never could have done, and I guess slowly and slowly it wore off. The memory stuck every now and then, possibly maybe when I tried to get a job and use my real name, but still, I could somehow – somehow it just passed over somewhat.

Q How do you feel about it now?

A I have dreams about it. To be [531] honest, I had dreams last night, and this is only my third day here. The dreams are not pleasant by any means.

Q How do you feel about it right now? I mean now that you've admitted the truth, do you feel – do you feel

as though – do you feel any different now that you've admitted the truth to us?

A I feel like I finally am owing up to something that needed to be paid up a long time ago, but I don't feel any better for having done what I have done. I know I would like to, if it's possible, to be able to.

I know there is good in me, if somehow it can be brought out and somehow in the past five years, after hurting Patty, I've been able to control it, but there's been times that it's been tough on me, but I haven't been drinking heavily at all, and so I guess, you know, in a way, I've been able to control it, and I know I have controlled it. In the past five years, I have not hurt anyone.

Q Are you sure of that?

A I'm positive. And if it is possible to get help, I would accept any kind in whatever [532] form.

Q Is there anything else that you want to add or say?

A Just that I am deeply sorry for having hurt Patty, and I am deeply sorry for all the time and trouble I have caused everyone in this city and the police force and my family and I'm sorry for the time I have robbed my real self, too.

Q What do you mean by that?

A Because all the good that possibly could have came, it's been nothing but bad when my goal was to help not hurt.

Q Sergeant Lauria?

SGT. LAURIA: I have no further questions.

Q (By Capt. Schlein) Dennis, anything else you want to add?

A I don't know. I'm shaking inside, but I'll accept whatever the Courts feel is necessary and my punishment without any hardship or judgment. I really want to thank you Captain and Sergeant for treating me with kindness through this whole affair, when I don't feel much kindness should be given me, you have been very kind, and I – that says about everything.

[533] Q. Okay. I will conclude this statement of Dennis Sochor. It is now four p.m., Sunday, June 1st, 1986."

(Thereupon, the tape-recorded portion was concluded.)

Q (By Mr. Hancock) Now, let me show you State's Exhibit KKK for identification and ask you if you recognize that?

A Yes, I do.

Q And how do you recognize that?

A This is a copy of a consent to search form that I am seeing.

Q Now, what did he say to you he had done with the truck, his boss' truck?

A Took the truck to Tampa, when he fled Fort Lauderdale, and left it in Tampa, which in fact was where it was recovered.

Q Did he say he had tried to do anything with that truck?

A Yeah, there was attempts made to clean it and wash it down, to the best that he could.

Q Now, do you see the person in the courtroom today that admitted that he had choked and killed the victim in this case?

A Yes, I do.

[534] Q. Can you point him out, for the record?

A Dennis Sochor, sitting next to the defense counsel, in the short-sleeve shirt.

MR. HANCOCK: Your Honor, may the record reflect he's identified the defendant, Dennis Sochor? Thank You.

MR. RICH: Your Honor, do you want to break?

THE COURT: How long are you going to be?

MR. RICH: Hours, possibly. There was a lot of direct examination.

THE COURT: We will recess until 2:15. I remind you again, not to discuss the case.

(Thereupon, a lunch recess was taken to 2:15 pm. of the same day, Friday, October 16, 1987, at which time the following proceedings were resumed, out of the presence of the jury:)

MR. RICH: She can't appear Monday morning, she tells me. When can you appear, Dr. Livingston?

DR. LIVINGSTON: Monday afternoon, late.

MR. RICH: How late?

DR. LIVINGSTON: 3:30.

THE COURT: You know, I've got other trials. The State is going to rest in a little [535] while.

MR. HANCOCK: I figured it would be about another hour.

THE COURT: You'd probably rest today, if you had everybody here, and then arguments Monday afternoon, and charge the jury Tuesday morning.

MR. RICH: Never happen, Judge.

THE COURT: I was just asking Charlie. He will be as long as an hour with Mark Schlein, and he's got like three other witnesses. It just depends how long his cross examination is going to be.

MR. RICH: It's going to go past five o'clock.

MR. HANCOCK: I can't imagine why because I bet he will be up there an hour and –

THE COURT: Yes. You know, I don't tell you how to try your case, but I have to keep this trial moving. We can't drag this out to next Wednesday or Thursday possibly. You know, you got places to go. I've got another trial waiting Tuesday, you know.

MR. HANCOCK: Is there any way that you can come back for Charlie Monday morning? I [536] Think that's when he'll really get to you.

THE COURT: Or late Monday morning?

DR. LIVINGSTON: How late could you have me Monday morning, Mr. Rich?

THE COURT: Somewhere around noontime, and I think we can still have final arguments Monday afternoon.

MR. RICH: If I finish with her.

DR. LINVINGSTON: Twelve noon?

THE COURT: Dr. Zager, ten or ten thirty, and you could be here when?

DR. LIVINGSTON: Twelve noon?

MR. RICH: Yes, ma'am.

DR. LIVINGSTON: Twelve noon?

MR. RICH: I don't want you sitting here all day and not get to you.

DR. LIVINGSTON: I don't either. So, twelve noon, Monday.

MR. HANCOCK: Your Honor, can I, for the record, introduce the original with the clerk's office, for the purpose for the clerk to keep it in her possession and not give it to the jury?

MR. RICH: Which one is it? As long as you don't confuse them.

THE CLERK: This tape will now be [537] forty-four for the State.

THE COURT: All right. Bring the jury in, please.

(Thereupon, the following proceedings were had within the presence of the jury:)

THE COURT: Good afternoon, members of the jury, Counsel concede the presence of the jury?

MR. HANCOCK: Please the Court, State does, Your Honor.

MR. RICH: Yes, please.

THE COURT: You are still under oath from this morning.

THE WITNESS: Yes, sir.

MR. RICH: May it please the Court.

CROSS EXAMINATION

BY RICH:

Q Dective [sic] Schlein, during the recess, we found out that certain portions of the tape were not transcribed. Do you recall that?

A Yes.

Q I would like for you to, if you would, see if you can find that portion of the tape that was deleted and play it again for us.

THE COURT: Now, the jury heard the tape if it wasn't put into the transcript –

[538] MR. RICH: I want the jury to know which portion of the tape was deleted from the transcript, Your Honor.

THE COURT: Why? That will be for final argument.

MR. HANCOCK: Judge, I don't have any problem, if I can just ask a couple of questions.

THE COURT: In other words, there was a transcription made of the tape, and it was first furnished to you, and it was not in there.

MR. RICH: And what was on the tape was not supplied to me in the transcript.

THE COURT: All right.

MR. HANCOCK: I don't have any problem, if I can just ask a couple of questions. Who does the transcription?

THE WITNESS: We have a secretarial pool.

MR. HANCOCK: And they are supposed to take everything down; is that correct?

THE WITNESS: Well, what happens is: The tape is given to the secretarial pool, and they have machines, and they are supposed to listen to every word and type it onto the transcript, and apparently, what happened is they left out [539] a page, listening to the tape. They missed it somehow. I don't know exactly how, but it was on the tape, and the page is not in the transcript, so they didn't type it, for some reason.

MR. HANCOCK: And did you listen to the tape and compare it with the transcript?

THE WITNESS: We listened to the tape, but presently, we don't read the transcript word for word. This is the first that I realized that one page is not in the transcript.

MR. HANCOCK: Then you give the transcript to me; is that correct, and I supply everything to Mr. Rich?

THE WITNESS: Presumeably. [sic]

MR. HANCOCK: So, there's just a short portion that's not –

THE WITNESS: Yeah, about a page.

THE COURT: So, neither the State nor the defense had the page; right?

MR. RICH: No, not even Mark didn't have it, Your Honor.

Q (By Mr. Rich) Would you play it, Mark? I think it's stopped at the page.

MR. RICH: For you, Mr. Hancock, the [540] deletion apparently appears between nine and ten.

Q (By Mr. Rich) It's where it is now.

A So, I have to go back to –

Q This is where the tape is now.

A So, you just want me to play this?

Q I want you to go back to "I would like to clear up one point." You can use the original, Detective Schlein, if you wish.

A No, I have got to go back a bit; right?

Q Yes, rewind it.

(The following is a tape-recorded statement played in open Court, which portion of the record is not certified as to accuracy or content:)

"Q I would like to clear up one point. When this incident happened with Patty, when you were in the parking lot, and she was in the truck, and the fight started, and she struck out at you, and you wound up choking her, when this happened, was your brother with you?

A No, he was not.

Q So, your brother was not present when you killed the girl?

A No.

[541] Q Did you ever tell him about your killing the girl?

A I did not.

Q So, he didn't really – he wasn't there to see it, and you didn't actually tell him about it?

A True.

Q When you left the Banana Boat, at that time, where was Patty? We know that she was possibly dead at that point, but was she in the truck, or where was she at that point?

A She was inside the truck.

Q Basically, I guess where she entered, on the passenger's side?

A Yes.

Q Did there come a time when you moved her from the front to the back?

A No.

Q The only time that you moved her was when you took her out of the truck at that location, when you finally put her on the ground?

A Yes.

Q I remember when we talked the other day. You indicated that you covered her with [542] something. What was that you covered her with? Do you remember?

A Possibly a blanket. I'm not real sure.

Q Was it already in the truck?

A Yes."

(Thereupon, the tape-recorded portion was concluded.)

Q (By Mr. Rich) Now, that particular portion then picks up, Detective Schlein, right here, I suppose. the next word would be "Yes, go ahead. I'm sorry." Would you just play that?

A Yes.

"Q Yeah, go ahead. I'm sorry."

Q Now, would you look at your original. Do you have it with you?

A Yes.

Q Would you look at it on page – let's go to page nine.

MR. HANCOCK: Page nine?

MR. RICH: Yes.

MR. HANCOCK: The third statement?

MR. RICH: Third statement.

THE WITNESS: Do you have a white copy of statement number three?

[543] MR. HANCOCK: You can have my copy.

Q (By Mr. Rich) I would like to have the original. I think Kelly has it somewhere.

A I had it over there earlier today. Hang on. Okay.

Q You got the original?

A Well –

Q The third statement?

A See, when you say the original – when we get a typed transcript, we get four copies, each of a different color. So, this would be the first copy. The blue might be the second ribbon copy. The white copy is what we consider the first copy.

Q So, you are looking at the numbering there on page nine of your copy?

A I have page nine now.

Q Then it goes page ten.

A Yes.

Q So, there is no indication, even on your copy, that a whole page is missing?

A That's correct.

Q And what you do, pursuant to discover, is you send us a copy of your copy; right?

A Yes.

Q So, the first time then that you were [544] aware that a whole portion of this transcript was missing was today?

A Yes.

MR. RICH: I would ask, Your Honor, that the court reporter type this portion up, so it can be made an official part of the record, over the weekend, just that portion that was missing.

THE COURT: Okay.

Q (By Mr. Rich) Now, the first chance that you would ever have to come in contact and talk to Mr. Sochor was when he was in the Dekalb County Jail, and he was charged with a minor traffic violation?

A Yes.

Q And his name came up on the NCIC National Computer Intelligence, whatever it is?

A As I understand it, a fingerprint check was conducted, and the FBI was able to identify him.

Q Now, you knew about Dennis Sochor as a suspect when you developed the film that was given to you by Delta Harville; right?

A We were able to identify him, correct, from that photograph? [sic]

Q You are referring to State's Exhibit Number Three; right?

A Yes.

[545] Q Now, as a result of that picture, did you cause to have that published in the paper? Was that your idea?

A Yes.

Q And as a result of this being published, and I guess it was in the Sun Sentinel or Herald –

A I think it was all papers, and on television, if I am not mistaken.

Q You got a tip that someone knew who that was; right?

A We received a phone call from his employer.

Q His employer's wife?

A Yes.

Q So, what date was that that you received that phone call, Detective Schlein?

A I would say it was around January Third or Fourth.

Q So, around January the Third or Fourth, of 1982, you were on the look-out for an individual by name of Dennis Sochor?

A Yes.

Q And you had his – I assume you researched and found out his background and everything about him; right?

[546] A Yes.

Q So, on January the Third, Dennis Sochor then was a prime suspect in this case?

A Definitely was someone we wanted to speak to about the disappearance, yes.

Q Was he a prime suspect?

A Well, you have to remember, at that point, we didn't know precisely what we had. Technically, we had a missing person.

Q When did Dennis Sochor become a prime suspect?

A After speaking with his brother, it was pretty clear in our minds that we had a homicide.

Q You didn't speak to the brother, that was Feltgen and Lauria?

A Yes, they flew up to Michigan.

Q Basically, your involvement in this case is when you went up to Atlanta, and got these three statements; correct?

A Yes, sir.

Q Now, you advised him of all of his rights?

A Yes.

Q He understood his rights?

A Yes.

Q Did not need an attorney?

[547] A No.

Q Knew why you were there?

A Yes.

Q And he freely and voluntarily then gave you these statement more or less? I mean, he gave you free and voluntary statements?

A Yes.

Q Now, did he ever indicate to you whether or not he had sexual intercourse with Patty Gifford?

A He clearly indicated he did not.

Q Now, this is before he had a chance to confer with any attorney and concock [sic] any type of a story? He just clearly told you that he did not have sexual intercourse with Patty Gifford?

A Yes.

Q Did he indicate to you that Patty Gifford went with him in the truck voluntarily?

A Yes, I think initially what he was saying is that she entered the truck voluntarily.

Q And as a matter of fact, Gary Sochor even indicated that she voluntarily got in the truck with the two Sochor's; right?

A I'm not as clear about what Gary said.

Q Now, when you went up to Atlanta to talk to Dennis, did you have all of Gary Sochor's [548] statements?

A They would have already been taken. I don't think I've ever read them.

Q You never read them, when you went up to interrogate Dennis?

A No.

Q You were the lead investigator in this case, were you not?

A No.

Q You were Commander of Homicide, but –

A Lead investigator was John Feltgen.

Q Did Feltgen go with you up to Atlanta?

A No, sir.

Q Lauria did?

A Yes.

Q When you went up there, you had no idea, no inclination, or no hint as to what Gary Sochor had said?

A No, I had a general – a pretty clear idea what Gary had said. I just don't remember reading his statement. I was given information, but I really understood the way Gary described the crime happening.

Q Well, did you know that when they first went up to talk to Gary, and Lauria and Feltgen identified themselves, that Gary's first words were, [549] "Dennis didn't do it. Dennis didn't do it. I know Dennis didn't do it?" Were you aware of that?

A Words to the effect, yes.

Q That was the first thing that Gary said, before they even advised him of why they were there.

MR. HANCOCK: I would object. I don't know if he can testify here. It's hearsay on hearsay.

THE COURT: Sustained.

Q (By Mr. Rich) Well, you were aware of the investigation, you weren't living in a vacuum.

A No, no. that's what they told me was said.

Q And you are also aware that Gary Sochor, in the beginning, denied that Patty Gifford ever got into the vehicle?

A The synopsis that I had was that Gary and Dennis basically got her into the truck, and then drove her, while she was struggling, to a remote area, where she was then raped and murdered. That was the essence of what Gary –

Q That's what Gary said?

A Yes.

Q So, Gary then, as far as your investigation revealed, was never a suspect in this [550] homicide?

A I was uncertain of precisely what role each individual played, and as I sit here right now, I think in my own mind, I know precisely pretty much what happened, but I can't be a hundred percent exact on what Gary did or didn't do.

Q Well, my question is? [sic] Was Gary ever, in the beginning, in the inception of this investigation, was

Gary Sochor a suspect either as an aider and abettor, or principal in a first degree in this crime?

A Yes.

Q Was it made known as far as you are concerned or someone in your supervision and control was it made known to Gary Sochor that he was a suspect as an aider or abetter or as a principal in the first degree to this homicide?

A I can't say precisely what questioning was made, but I know he would have been.

MR. HANCOCK: Judge, I have an objection, if he is getting – you know, both of the other detectives testified. If he is saying something he knows from personal knowledge, I don't have an objection, but if he is surmising from what someone else told him, that's definitely hearsay on hearsay.

[551] THE COURT: Well, sustained. I assume that the Captain knows what is hearsay and what isn't, what you know of your own knowledge, and not what's in the report.

THE WITNESS: Well, I know that my investigators, when they conduct investigations, are suspicious of everyone, and clearly Gary was a suspect in the incident.

Q (By Mr. Rich) Now, when you first went up there, and you took the statement, the first statement, of Dennis, your statement started about 11:35 p.m., in the afternoon, Thursday, May 29th; is that correct? That's when the taped statement started; is that correct?

A No, it was later than that, I believe. One thirty, I believe, the first statement. I think you probably have statement number three there.

Q Well –

A That's how our transcribers get confused sometimes.

Q The first statement was taken on May – have you got your statements there?

A Yeah, May 29th, I think, one thirty-five p.m.

Q That's what I said.

[552] A You said 11:35.

Q If I did, I'm sorry. I have 1:35 p.m.

A Okay.

Q You want to get them out and refer to them anytime you want to? Now, what time did you first confront Dennis Sochor?

A About nine a.m., 9:10, 9:15, in the morning.

Q In the morning?

A Yes.

Q And from 9:15 a.m. to about 1:35 p.m., did you discuss this case with him that was off the tape?

A Yes.

Q For how many hours?

A Well, when you take away the time for lunch and bathroom and cigarettes, several hours of conversation occurred, before we went on tape.

Q And where was this conversation taking place?

A In an interview room in the Sheriff's Office.

Q So, what would be a fair estimate of the hours that you talked with Dennis, before you started taking a taped statement?

A I would say two-and-a-half to three hours.

[553] Q And during that time, those two and a half to three hours, did you discuss the case, of what Gary had said?

A No, not precisely what Gary had said. The beginning of our questioning was really more or less a series of denial. We spent a lot of time going around in circles. Initially, he denied being Dennis Sochor. He denied ever being in Fort Lauderdale. That took some time. When we made our break-through was when he initially admitted that he was Dennis Sochor and lived in Fort Lauderdale. That was the beginning of the admissions.

Q And during that period of time, did you also let Dennis know that they had already talked to Gary about this case?

A Yes. It wasn't immediately, but as we wore on with our interview, we definitely indicated to him that we had already spoken to Gary, then I think that helped to convince him to begin to tell us part of the story.

Q Did you advise Dennis that Gary had made a statement implicating Dennis?

A I don't remember the exact words, but we clearly indicated that we had gotten the whole story from Gary.

[554] Q And that Gary had blamed this homicide on Dennis; is that correct?

A Yes, Gary did.

Q Did you tell Dennis that Gary blamed –

A Not in those words. At that point in the interview, we indicated to him that we had the photograph, which he saw, and that we had already spoken to Gary, and as questioning goes, those were the keys at that time that began to, I guess encourage him to tell us part of the story.

Q Well, the question is: Did you indicate in your questioning for those two, two-and-a-half hours, that Gary had made a statement and implicated Dennis?

A Yes.

Q And that's when Dennis decided that he wanted to tell his story?

A Well, it began with the photograph, which we did not use immediately. The photograph was sort of irrefutable, and I guess did convince him that we knew he was living in Fort Lauderdale, and then when we indicated that we had already spoken to Gary. It was a gradual process. It didn't happen instantly.

Q I understand, but over the period of two-and-a-half hours, you gave Dennis the impression [555] and the inclination that Gary had already testified in the statement against his brother?

A Yes.

Q And that's when he started opening up, when he knew that Gary had made a statement?

A That was part of it, yes.

Q Now, when he first made that statement, he didn't have much of a recollection of what had happened that night, did he?

A If you are asking my opinion, I have an opinion on that.

Q Well, he didn't give you direction answers?

A Correct.

Q And you felt that he wasn't coming clean with you; right?

A Yes, sir.

Q That he knew more than he was telling you?

A Yes.

Q Did you ever get the impression that he might have been covering up for his brother?

A No.

Q Well, he says in the portion of the statement that we unfortunately don't have a transcript of, he says there that his brother was not even with [556] him.

A He clearly told me that in the third statement.

Q His brother was not with him?

A He never once admitted that his brother was there.

Q In fact, he said that he took his brother home, dropped him off, and then went back to the Banana Boat; right?

A Yeah, he indicated a couple of different things. He said at one point he said he dropped his brother off at the beach, and another point, he dropped him off at home, but clearly, he never admitted that Gary was with him, when the crime occurred.

Q And you have no explanation of why that particular portion of the transcript was deleted, except just inadvertance?

A I can assure you that it was an oversight by the secretary. They have a lot of work, and you are absolutely right, someone should have picked this up, but frankly, no one compared the transcript word for word with the original tape, but I can assure you that the girl that typed this up just made an oversight.

Q Let me ask you this question: Do you ever proofread these transcripts?

[557] A Well, I can tell you honestly, years ago, when I was a detective, I used to, but at this point now having – when I took the statements and delivered them over to the investigators, I truly didn't look at this transcript, and this is the first time that I realized that we are missing a page here.

Q and if I hadn't called your attention to it, you probably would have never gotten –

A I never would have realized that you didn't have the page that was on the tape that was missing.

Q During this, not only this first statement, but all these statements, it appeared that Dennis was very emotional and very much concerned about his brother, Gary.

A Dennis would really become emotional very, very quickly, depending on a question or location. He would go from calm to emotional quickly. I don't think he was very concerned about Gary. I think he was concerned about himself really, if the truth be known.

Q Well, in all of these three statements, he never indicated to you that he had sexual intercourse with Patty?

A He did not.

Q In all of these three statements, he never [558] indicated to you that he had abducted and kidnapped her, forcibly put her into the truck from the Banana Boat?

A That's that complicated question.

Q What he indicated was that after she I will say voluntarily got into his truck, she resisted his advances sexually, and then be choked her to death?

A That's what he admitted.

Q Then you brought him back to this area, and he tried to cooperate with you to discover the whereabouts of Patty's remains?

A Yes.

Q And he took you where, down I-95?

A We never went down I-95. We went west on 84, and then we went out west, but we didn't take – I take

that back. We took one road down south of I-95. I'm not sure what exit, combing the entire southwest, going up and down road that were very different.

Q But Gary told you that it was 84, and Dennis told you I-95?

A I don't remember exactly what Gary said. I know they both –

Q Just go with what Dennis – Dennis told you he drove south on I-95?

A Yes.

[559] Q And he was never able to give you any clues as to where the remains of Patty Gifford were?

A We never found her.

Q And for that matter, neither was Gary able to give you any clues as to where the remains of Patty Gifford were?

A Well, we never found them. We probably never will.

MR. RICH: Thank you. I have no further questions. Thank you.

MR. HANCOCK: Just a couple, Your Honor, with your permission.

REDIRECT EXAMINATION

BY MR. HANCOCK:

Q Now, you found out that he was picked up in Georgia. What name did you find out he was using?

A In Georgia, he was using the name John McGloffin, and with us, he used the name Michael Jacobs.

Q Now, did he ever indicate what he wanted from Patty?

A Yes.

Q What was that?

A Sex.

Q And what did he indicate that she had [560] done?

A She resisted, and that's what led to the choking.

Q Now, you indicated that, when Mr. Rich asked you about him coming clean, why didn't you feel he wasn't coming clean with you?

A I basically, after examining the case, feel we know pretty much what happened, and we don't believe to this day that he has admitted completely what happened for a variety of reasons.

Q What were those reasons?

A Well, in my experience, it's very difficult for someone who's committed a murder in many cases to admit it, number one, to the police. That's obviously difficult, but subconsciously, it's important to come out with a version that you can live with, with a certain amount of pride. In this particular case, as I sit here, I believe the girl was abducted, raped, and murdered out in a remote area. To admit to a rape and murder is much more vial [sic] than simply admitting that she was choked while resisting his advances, almost accidentally, and I

think it's important in Dennis' case, since he is so emotional, to admit a version that he can live with, and that's exactly the way we see it. There is no doubt in our mind that both he and Gary [561] were present, that she was raped and murdered.

MR. HANCOCK: Thank you.

RECROSS EXAMINATION

BY MR. RICH:

Q That's just your opinion, isn't it?

A Yes.

Q You have no proof or evidence to sustain that opinion, do you?

A No.

Q That's just your gut feeling?

A Just a -

Q You don't know beyond every exclusion of a reasonable doubt, do you?

A That's just my opinion.

MR. RICH: Thank you.

THE COURT: Anymore [sic] questions?

MR. HANCOCK: None by the State. Thank you for coming.

Your Honor, we will next call Michael Hickey, and he is on his way up. I guess I can call another witness. I will call Paul Jones.

Thereupon, the State of Florida, further to maintain the issues on their part to be maintained, called as a witness PAUL JONES, who, being first duly sworn, was examined and testified as follows:

* * *

Supreme Court, U.S.
FILED
DEC 26 1992
OFFICE OF THE CLERK

No. 91-5843

In The

Supreme Court of the United States

October Term, 1991

DENNIS SOCHOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari
To The Florida Supreme Court

JOINT APPENDIX
VOLUME II

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* * *

[949] October 21st, 1986, at which time the following proceedings were had:)

THE COURT: There is no rule at this time?

MR. HANCOCK: Yes.

THE COURT: Are you ready to proceed?

MR. HANCOCK: Yes, Judge. Just for the record, Mr. Rich and I have discussed the sentencing phase, and I have told him what evidence that we're going to put on, and which ones that we will argue, and out of those, I've indicated to him that we would argue number two, number four, number eight, and number nine, and Mr. Rich requested to argue number one, for the mitigating circumstances, number two, number four, number five, number six and number eight.

MR. RICH: Also, Your Honor, through stipulation, we would put in – I have copies of them too, Your Honor – all of the medical reports. By Stipulation, we would put those in, too.

MR. HANCOCK: I don't have anything written on mine, but I do have a couple of places underlined.

MR. RICH: I think I got mine. It may not be underlined. These are all clean copies. We [950] should make clean copies of those things. Go ahead put the clean copies in.

MR. HANCOCK: State's ready, Your Honor.

MR. RICH: Defense is ready.

THE COURT: Bring the jury in, please. Good afternoon, members of the jury. Counsel concede the presence of the jury and waive their polling?

MR. HANCOCK: Please the Court, State does.

MR. RICH: Yes, Your Honor, please.

THE COURT: Ladies and gentlemen of the jury, you have found the defendant guilty of murder in the first degree, and the punishment for this crime is either death or life imprisonment, without the possibility of parole for twenty-five years.

Final decision as to what punishment shall be imposed rests solely with the judge of the this court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

The State and the defendant may now present evidence relative to the nature of the [951] crime and the character of the defendant, and you are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty, and second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factor is in aggravation and mitigation that you may consider.

State wish to present some evidence?

MR. HANCOCK: Yes, we would, Your Honor. With your permission, we will first call Patricia Neil [sic].

Thereupon, the State of Florida, to maintain the issues on their part to be maintained, called as a witness, PATRICIA NEAL, who, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANCOCK:

Q Please state your name and spell your last [952] name.

A Patricia Ann Neal, N-e-a-l.

Q And ma'am, where do you live?

A Fort Campbell, Kentucky.

Q Did you know an individual by the name of Dennis Sochor?

A Yes.

Q Can you please tell the ladies and gentlemen of the jury how you knew him?

A I was married to him.

Q Can you tell us how long you were married to him for?

A Approximately one year. Well, we were together one year.

Q Now, let me show you State's Exhibit A for identification and ask you if you recognize that.

A Yes, that's a picture of me.

Q Was that when you were married to him?

A Right.

MR. HANCOCK: At this time, we respectfully ask that this be introduced in evidence, State's Exhibit A.

MR. RICH: No objection.

THE COURT: Maybe [sic] received.

THE CLERK: State's Number One.

[953] Q (By Mr. Hancock) What color hair did you have back then, when you were married to him?

A Light brown, blond, somewhere around there.

Q And this picture resembles the way you looked back then; is that correct?

A Yes.

Q Now, where did you live with him at?

A In Italy.

Q How long did you live in Italy for?

A About a year and four months, maybe.

Q And how did he treat you?

A Not well.

Q What do you mean by that?

A The marriage was quite violent.

Q And when did it start becoming violent?

A The first time that Dennis was really violent with me was New Year's Eve of '74.

Q And after that, then there came certain incidents that occurred; is that correct?

A Yes.

Q Did there ever come an incident where he grabbed you by the neck, the throat?

A Yes, one time he did.

Q Can you tell us about that, if you would, [954] please?

A We were having an argument about something, and he was slapping me around back and forth, and I reached out and slapped him back, and it made him mad, and he just went for my throat and shook me, until I guess he thought I had enough, and then threw me down on the floor.

Q And how many times were you assaulted by Dennis Sochor?

A I would say at the least, thirty times in the year.

Q And attempted to try and black that out since you remarried; is that correct?

A Yes.

Now, what would happen if you objected to his sexual preferences, behavior?

A Dennis usually got his own way. If he wanted sex, he got it because he would get violent, if he didn't get it, so I didn't usually fight him off.

Q What would happen when he would get violent?

A When Dennis got violent, he usually – his eyes would kind of glaze over, and he would just get wild.

Q Can you describe the way his eyes would [955] look when he would get wild?

A They would just kind of glaze over, and he just – it was just a real violent look, anger.

Q Now, can you describe his temper, if you would?

A Dennis' temper was very violent. When he got mad, he just went after anybody that was around that he could take it out on.

Q Now, back in the time you were married with him, and when he would become angry and violent, as you've testified, was he ever under the influence of alcohol during those times?

A Not usually.

Q And back then, he wasn't drinking, would that be a fair statement?

A Yes. We would go out once in a while, but it wasn't constant drinking, no.

Q So, he would have this behavior, even when he wasn't on alcohol, would that be a fair statement?

A Yes.

Q And who was his father and mother, their names?

A Charles Sochor, and I forget his mother's name, sorry.

Q And can you describe the family, if you [956] would, real briefly?

A They are nice people. They treated me real well.

Q And besides this violent behavior, did anything else occur in Italy?

A Well, Dennis would disappear at night. I didn't know where he went. I would get up in the night, and he would be gone, and sometimes he would come in at two or three in the morning, sometimes later. One time he went out to the car and slammed the door and the trunk flew open, and there was a lot of purses in the car, and I asked him where he got them from, and he said he got them from the whores.

Q That was eventually another reason why you divorced him is that correct? Was that one of the reasons?

A It was a mutual thing. We just both decided on divorce.

MR. HANCOCK: Thank you very much. Thank you, Your Honor.

MR. RICH: Thank you. May it please the Court.

CROSS EXAMINATION

BY MR. RICH:

Q You testified, Ms. Neal, that he would get [957] violent with you, and he would slap you around about thirty times in the first year; at least once a month, you'd get slapped around?

A I would say so, yes.

Q And while in the service at the time, did you ever attempt to get some psychologist to look at Dennis? Did you complain to any of the medical people there about his behavior?

A One time, we went in for counseling, marriage counseling.

Q Was it a psychiatrist or marriage counseler [sic], psychologist in the Army that discussed it with you?

A I am not sure. I think a psychiatrist, but I'm not sure.

Q But it was in Italy?

A Yes.

Q Did the psychiatrist at that point advise y as to what kind of problems Dennis has?

A No.

Q Did they recommend that he go into the hospital for any type of care, psychiatric care?

A No.

Q Did you think that maybe he might need psychiatric help and care, is that why you went?

[958] A No, I Just wanted the marriage to be better.

Q You didn't think there was anything unusual about his behavior at that point?

A I don't know. I kind of just – I put up with it. I figured most – you know, I just put up with it.

Q This one occasion he choked you, had he been drinking?

A No, not at all.

Q And these violent fits of temper, he had never been drinking? He didn't have a drinking problem, while he was in Italy?

A No.

Q How about a drug problem, while he was in Italy?

A Not a drug problem, but he did smoke hash.

Q What is hash, do you know? It's a narcotic drug; right?

A Yeah, a drug.

Q How often would he smoke hashish, if you know?

A I don't really know. I would say once a week, or just whenever it was there.

Q Was it readily available to him, hashish?

[959] A Yeah.

Q You, yourself, didn't use hashish, did you?

A I tried it, yes.

Q I hope that Statute of Limitations has run on that. It was when, back in seventy-four?

A I hope so, too.

Q So, all these behaviors and all these things, you just went to the psychiatrist once?

A Yes.

Q And he didn't recommend that Dennis have any psychiatric evaluation or anything like that?

A No.

Q And you never went back?

A No.

Q And nothing ever came, other than that one evaluation, one time that you went to the psychiatrist?

A No, we didn't go back.

Q You didn't go back.

A No.

Q Did the psychiatrist say that you should come back?

A I think so, yes.

Q Did the psychiatrist advise you that Dennis had problems that needed to be treated?

[960] A No.

Q Back in seventy-four?

A No.

Q Now, you say he choked you. That only occurred on one occasion?

A Right, one time.

Q When was that?

A When was it?

Q Yes.

A As a date?

Q What year?

A It would have been in seventy-four.

Q And –

A It could have been seventy-four, seventy-five. We were sent overseas the end of seventy-four. We were there for the year of seventy-four. We were there for the year of seventy-five, so it must have been seventy-five, yes.

Q Then after that particular incident, how did he react, after it occurred, let's say like the next day?

A Like nothing ever happened. It was usually either like nothing ever happened, or else he would be real nice to me, and it would be forgotten.

Q How about all these other incidents, all these assaults, how long would it be that he would act [961] like nothing had happened? Would it be a matter of days? Would it be a matter of much hours or what?

A It would just be forgotten about.

Q How soon?

A How soon?

Q Yes.

A Usually right away. Usually, he went out afterwards. Like after the choking incident, he went out right afterwards, and then it was –

Q How long was he gone?

A Most of the night.

Q When he came back the next day, he acted as if nothing had happened?

A As if nothing had ever happened.

Q Was it a similar situation with all the times that he assaulted you?

A Yes.

Q The next day, he would act like nothing had happened?

A Yeah. It usually was never talked about.

Q I hate to get too personal, but when you had sexual relations, was he ever violent to you?

A Only if I resisted.

Q And you figured it was just –

A I didn't resist.

[962] Q Why, could you be a little more specific? What would he say, or what would he do, if you resisted?

A He would just get mad and say that –

Q He didn't beat you though, did he?

A Well, not beatings, because I didn't usually resist long enough for him to get that made [sic]. There was one incident where I resisted him. We were in a tent, and there were a lot of people around, so I thought well, I might be able to get away with this because there was a lot of people around. He wouldn't beat me in front of these people, but I was laying on my side, and he come

up behind me and slugged me in the stomach at one point, where it knocked the air out of me, and I just gave in. It was easier.

Q But all these assaults, you only went to the psychiatrist once for help?

A Yes.

Q Did you personally feel that Dennis had problems, psychiatric problems, that needed to be taken care of?

A I blamed a lot of it on myself. I felt like it was a reflection of me, that I was doing something wrong, because he was beating on me.

Q Well, could you tell us what you felt that [963] you were doing wrong that –

A I didn't know because sometimes I didn't know why he was mad.

Q When did you divorce Dennis, do you remember?

A I came back to the State's in June of seventy-six, filed for divorce, when I had the money for it, and I think it went through in seventy-seven, early seventy-seven.

Q And it was a mutual divorce? It wasn't a nasty divorce? It was by mutual consent?

A Right.

Q Now, when you say his eyes used to glaze over, did he appear to you at that particular point to be crazy sometimes? Is that the way you describe it?

A Well, no.

Q Isn't that the way you described in your statement, his eyes –

A They didn't glaze over like –

Q I think your words were that he acted kind of crazy, and he got real eary [sic].

A Eary [sic], that's the word I was –

Q You didn't use the word crazy?

A Eary [sic], crazy. It's hard to describe.

Q Like a psychotic look?

[964] A Yeah, I guess you would say.

Q The whole time that you were married to him though, Dennis never assaulted anyone else, that you know of? There was no charges or any charges filed or anything like that?

A No, not that I know of.

Q If there would have been charges filed, you would have known about it?

A Yes.

MR. RICH: I have no further questions.

REDIRECT EXAMINATION

BY MR. HANCOCK:

Q Did he ever come back with any marks on his body, after he had been out all night?

A Yeah, one night he did. He came back with scratches on his face or his face was scratched up. He went out for a run.

MR. HANCOCK: Thank you very much.

RECROSS EXAMINATION

BY RICH:

Q Let me ask you one question. He was a jogger, he did a lot of jogging, when you say he went out for a run?

A Yes, that's what I said.

Q He didn't explain to you that he ran into [965] some thorn bushes, and that's how he got is [sic] face scratched up?

A Yes.

Q Did it look like he was scratched by thorn bushes?

A No, sir.

Q Is that what he told you?

A That's what he told me. At the time, I believed him.

Q You believed him at the time. You don't believe him now?

A Well, when I came back to the States, I asked him about it, and he said no, that he had tried to snatch a purse from one of the whores, and she had gotten ahold of him.

Q So, he had a habit of stealing purses from whores?

A Yes, sir.

Q Never assaulted them, just stole purses?

A I don't know.

MR. RICH: I have no further questions.

MR. HANCOCK: Thank you for coming today.

MR. HANCOCK: We call, Your Honor, with your permission, Dr. Ronald Wright.

(Thereupon, the State of Florida, further [966] to maintain the issues on their part to be maintained, called as a witness, DR. RONALD WRIGHT, who, being first duly sworn, was examined and testified as follows:)

DIRECT EXAMINATION

BY MR. HANCOCK:

Q Please state your name and spell your last name, sir?

A Dr. Ronald Wright, W-r-i-g-h-t.

Q And what's your occupation or employment, sir?

A I am a forensic pathologist.

Q What is that?

A It's a Doctor of Medicine, who specializes in pathology, primarily the specialty having to do with the diagnosis of disease, and then further specializes in

forensic aspect, which primarily has to do with the determination of the cause of death of people who die suddenly and unexpectedly, who are thought to die as a result of some kind of injury.

Q Where are you employed now?

A The University of Miami, School of Medicine, which has a contract with Broward County based upon my appointment by the Governor as the District Medical Examiner of District 17 of the State [967] of Florida, which happens to be Broward County.

Q You are the Chief Medical Examiner for Broward County; correct?

A Right.

Q Now, have you had occasion to deal with cases that involve a choking death?

A Yes, I have.

Q And what is the cause of death on those, the legal term?

A Well, asphyxiation is the term which we tend to use.

Q Can you tell us how death occurs?

A Well, basically what occurs in that kind of death, which is often called a manual strangulation, which the technical term for a choking, as to interfere in a material way with the getting of oxygen down through the throat. This is done by compression of the structures in the nect [sic] or a squeezing of them, accompanied with either

fracturing or bending the skeleton of the next [sic] structures.

When that is done, there is a loss of new air into the lungs, and then after a period of time, there is a loss of ability of the body to stay alive. Oxygen, which is in the air which we breathe, is required to continue the chemical reactions which make [968] up life.

Q Now, you dealt with that on numerous occasions with this cause of death; is that correct?

A Yes, I have.

Q And you have even had occasion to talk to people who have been choked before and survived?

A That's correct. I have treated individuals in my background as an emergency room doctor who have been strangled, but not to death, I've dealt with a number of other cases of individuals that it this has happened to.

Q Is it a slow death?

A Yes, it is, relatively speaking.

Q Why is it a slow death?

A Primarily because the length of time, which is required when one loses oxygen supply of the body, does have some limited ability to continue certain processes without oxygen. For instance, on an average, the heart will continue to beat ten to fifteen minutes after its oxygen supply is deprived. It therefore makes things take a relatively long period of time if one defines death on the basis of loss of hearbeat for instance, it is relatively slow.

Q How about as to pain, how much pain is involved in a choking death?

[969] A Obviously, pain is dependent upon the perception of the individual. I can talk about that in regard to the sort of things which are possible, how that will be interpreted by the individual obviously varies from person to person. There are two major components. Number one, the pressure on the nect [sic] causes bending and tearing of the skeleton of the neck structure. That is painful at the time, as any tearing and sending of messages to the brain.

Also, there is the feeling of the inability to get one's breath, which is extremely frightening, too. Ordinarily, there is a strong desire by people to continue to breathe, and that when they can't do that, it causes a panic reaction ordinarily.

Q Now, you have had occasion to read some of the statements in this case that the defendant gave to Captain Schlein; is that correct?

A That's correct.

Q And you base some of these opinions on those; is that correct?

A That's correct.

MR. HANCOCK: Thank you, Dr. Wright.

CROSS EXAMINATION

BY MR. RICH:

Q Of course, you never had the opportunity [970] Doctor, to exam the body in this case?

A No, I did not.

Q So, you don't know if there was any tearing of the vertebrate or rupture of the vertebrate?

A No, I do not.

Q And you certainly don't know the length of time it took where there was excruciating pain, as a result of this choking?

A I can tell you the minimu [sic]. I can't tell you the maximum.

Q Is it possible to just choke somebody and kill them, without breaking the vertebrate and without breaking the neck?

A Yes, it is. The younger a person is, the more unlikely it is that the major bone – there are a couple of different bones that – or cartilages which are involved here. One is the hioid (phonetic) bone, and in the case of the young lady here, it would be highly unlikely, in my opinion, that there would be a breaking of that bone. It would just bend. You have to be as old as I am.

Q Or me.

A Or whatever, to have that one break. The cartilages on the back of the thyroid cartilage, which is the voice box, the back end of it will also, in [971] somebody

that is young, generally just bend, tearing muscular attachments and will not break.

Q So, you have no way of knowing the length of time it took to effect the death of a person by this choking in this case, no way you could possibly tell?

A Actually you can. There are a couple of minimums.

Q What's the minimum?

A Thirteen seconds. Thirteen seconds is the length of time that the brain continues to function, after you constrict all the blood supply to it. I don't know if it is possible to do that with a manual strangulation, there being four blood vessels, two of which one of the back inside of the vertebrate column. That's a little hard to restrict. That's that absolute minimum of loss of consciousness. The maximum period, obviously I don't know because you can –

Q Choke and let up and choke?

A Right, exactly.

Q In reading the reports, did you read also the statements of Gary Sochor?

A I did not see those, no, sir.

Q Just the statements of Dennis Sochor?

A That's correct.

Q And if Gary Sochor said that this took [972] place very quickly, would there be an excruciating amount of pain and suffering as a result of a very quick choking?

A No. It would be possible to product unconsciousness very rapidly in a person who had previously exercised, under that set of circumstances in which there is all ready [sic] a shortness of breath, unconsciousness can be within that thirteen or very close to that thirteen second period of time.

Q How about if someone was exerting a lot of physical exertion or using a lot of physical exertion in a power struggle?

A That's the sort of thing, if that was enough that she would have been short of breath to start with from the exertion, that will shorten considerably the lenghth [sic] of time it takes to produce unconsciousness. Death is not shortened nearly as much, but the period to unconsciousness is.

Q Well, if a person is placed unconscious, then within a short brief span then there wouldn't be much pain?

A None.

Q There would be no pain?

A Not during that period of unconsciousness.

Q So, it's very possible, with a reasonable [973] degree of medical probability, say that this could be a very quick death without much pain?

A It could be very quick without pain. The death always takes a little bit longer.

Q What I am talking about, the unconsciousness would ensue very rapidly?

A Yes, that is correct. It is in that hypothetical which you gave of the exertion which would cause shortness of breath prior to the onset of the choking the unconsciousness could occur fairly rapidly within a matter of thirteen seconds being the absolute minimum, probably more like somewhere closer to a minute.

Q So, again during that unconscious period, there would be absolutely no pain?

A That's correct.

MR. RICH: Thank you, Doctor.

MR. HANCOCK: Just to [sic] questions, Your Honor.

REDIRECT EXAMINATION

BY MR. HANCOCK:

Q You said that usually it could be closer to a minute?

A Yes.

Q So generally, it would take a minute, [974] before they would become unconscious; is that correct?

A That's correct, in somebody who's already short of breath.

Q And if they are not short of breath, it might even take longer than that; is that correct?

A About four minutes for unconsciousness, if they are not.

Q If someone is resisting and struggling and fighting and screaming and begging for their life, resisting the choking, then that could even take a longer period of time; is that correct, depending on how much resistance was put up?

A That's correct. You start the clock again, all be it a slightly shorter clock every time that there's a release of the pressure on the neck, if another breath is gasped, you start the clock running again because you resupplied the body with oxygen. It shortens it a little bit because again, this shortness of breath that occurs.

MR. HANCOCK: Thank you, Doctor.

MR. RICH: Thank you, Doctor.

MR. HANCOCK: We next call Captain Mark Schlein, Your Honor.

THE COURT: I suppose he is still under oath. Go ahead and swear him again, just to [975] make sure.

(Thereupon, the State of Florida, further to maintain the issues on their [sic] to be maintained, called as a witness MARK SCHLEIN, who, being first duly sworn, was examined and testified as follows:)

DIRECT EXAMINATION

BY MR. HANCOCK:

Q Now, Captain, you testified previously in the guilt phase; is that correct?

A Yes, sir.

Q Now, you indicated that taped statement you had taken from him, the Court had ordered certain portions taken out; is that correct?

A Yes.

Q And what portions were taken out of that tape?

A Specifically those that are addressed to prior rapes that Dennis had committed and confessed to it at the same time. One occurred in Fort Lauderdale for which he had been convicted, and the earlier one was a Michigan rape, which he also confessed to on the statement, which was requested to be deleted.

Q And the one in Michigan, do you know when that occurred?

A Yes, it occurred in August of 1979 in and [976] around Pontiac, Michigan. Dennis met a young lady at a bar, and engaged her in conversation, asked her if she would be nice enough to drive him home. She asked if he lived in the immediate area. He said yes. They got into his car. He proceeded to give her some directions, and she began driving. During the drive, he began to embrace and kiss her, while she was behind the wheel. She resisted. She was then choked to unconsciousness. When she woke, he again, according to her sworn statement, she was nude. She had deficated [sic] in the car and on herself, and he was, in fact, raping her. When the rape was completed, they continued to his house, where she was bought [sic] inside, allowed to take a shower and was raped two more times, and in addition, was forced to commit an oral sex act.

Q And now, you investigated this case; isn't that correct, and had the reports from Michigan?

A Yes, we had all this information prior to actually finding Dennis in Dekalb County, Georgia.

Q In fact, he was a fugitive on that one?

A Yes, he was a fugitive from justice on that case, and that case is still pending against him.

Q Now, with permission of Judge Seay, can you play the rest of the taped statement, if you would? I think it's only about ten minutes.

[977] (The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content:)

"The following will be a tape recorded statement.

Q When did you first get to Atlanta?

A Actuall [sic] two years ago.

Q And prior to coming to Atlanta, where were you living?

A In New orleans, [sic] Louisiana.

Q And prior to New Orleans, where were you living?

A Fort Lauderdale.

Q I'd like to ask you if you have ever been in trouble with the low or arrested before?

A Yes.

Q Was one arrest in the State of Michigan?

A Yes.

Q And what was the charge in that case?

A Rape or aggravated something, I'm not completely sure.

Q Okay.

[978] A Well, it was more than that, there was, you know, drunk, public drunk arrest.

Q I want you to think back and tell me about that incident that happened in Michigan because I think it's important. What happened in Michigan with that particular girl that they charged you with raping? Where did you meet her?

A I met her at a bar. I was out with three friends. We went to a concert and then we came to a bar, and we were sitting down just drinking, talking, my two friends. They were both male, and then I started talking to one girl, and we got going and talking and this and that and somewhere along the line, my buddies were ready to leave, and the girl said well that's all right. I'll take you home, so she did.

Q She took you to your house?

A Yes, the place I was staying.

Q Do you remember where that was?

A It was in the country, someplace outside of Pontiac. I can't remember. I don't remember the road.

Q Was it on apartment or a house?

[979] A No, I was a stable boy, so it was more of an apartment.

Q It was on a horse type ranch?

A It was on a horse ranch, yes.

Q Ok.

A It had a full kitchen layout.

Q I see. The girl drove you home, then tell me what happened.

A I was, I know I was quite drunk after the concert and the bar, but we started talking about, you know, sex or something, having sex later that night cause I guess I felt that was one of her intentions of her driving me home, as I was with my friends at the bar and already had a ride.

Q You felt that because she drove you home, she basically was sort of suggesting to you that she wanted to have sex with you?

A Yes.

Q What happened when she got you to the house?

A Well, what happened then was that I couldn't understand. She didn't want sex this evening.

Q She said no?

[980] A Yes.

Q Then what happened?

A Well, I just thought it was more of a tease, and I, you know, kept trying to talk her into it, and she was

insisting no, I guess, and from then on, there was a point where –

Q What happened when she said no? What happens when a girl says no to you? What happens to you, what happened then?

A Not always, but this aprticular [sic] time, it was just an inner feeling, something, I don't know, a different kind of a take over in me. I didn't feel as part of me, but that's you know, these actions were coming from me.

Q Something inside you?

A Yes.

Q What did it make you do?

A It made me want to have sex more then, you know, anything else probably in the world at that time.

Q And what did you do?

A And I forced myself, forced her to have sex with me.

Q Do you remember seeing any visual signs that she'd been hurt, on her body or her [981] face?

A Yes.

Q What did you see?

A I seen choke marks.

Q What did you think, what did you think when you were choking her into having sex with you, what were you thinking, what was happening to you?

A Nothing. I don't – I couldn't think nothing.

Q Why couldn't you think?

A I don't know why I couldn't think. It was all I can relate to it like an airplane jump, my first airplane jump. There was no feeling, no emotion. I don't know if you ever jumped out of an airplane, but my first jump was out of a jet, and it's like now I know I'm existing right here sitting in this chair, but at that point, I wasn't existing.

Q After the rape was over, and you choked her and force her into having sex, did you feel anything?

A At the particular time, it was over because I passed out, but when I awoken [sic], and she was still in the room, it was early morning, and [982] I couldn't understand why she'd be there because when I woke up I, you know, did recall that, you know, something bad did happen last night, and I was soothing and somewhat trying to be loving and apologetic, and I went out a got a can of gas and put it in her car cause she said she didn't have gas, and she left.

Q When was the next time you remember being arrested for this kind of a problem, this kind of a charge?

A Well, about, the next time was in Florida, Fort Lauderdale. I'm not sure about the time, maybe eight months later.

Q Okay. Let's think back to that incident. Was there a bar involved?

A Yes.

Q You met a girl in the bar?

A Yes.

Q Describe what happened.

A It was the same type thing where we discussed that I had some drugs, which I did not.

Q She wanted to know if you had any?

A Yes.

Q Okay, go ahead.

[983] A And then we left, and when she found out I didn't have any drugs, well, she talked of having sex, and when she found out I didn't have any drugs, she didn't want nothing to do with that, and similar to the same type thing that happened the first time.

Q Well, when she said no, in other words, you went from the bar to where you were living?

A Yes.

Q And what kind of place was it that you were living?

A Oh, it was a house trailer.

Q And how did you get from the bar to the house trailer?

A In her car.

Q You got to the house trailer, and she decided she did not want to have sex. She said no; is that correct?

A That's correct.

Q What happened at that point, when she said no. What happened to you? Describe what happened?

A That same type feeling of – it's difficult because the feeling is something I [984] don't know what it is, but there is something in here that has more control over the situation than I do.

Q Something tells you what, that you need to have sex?

A Yes, but it's more than that. It's – but I have had these urges with, on many number of times, but I passed the urge up.

Q You manage to fight it?

A Or just release it. Or this time it was a point that there was, you know, a part of me that was like arguing with me, saying you know, no don't do this.

Q What did you do?

A But at this instant the urge came where I just didn't have no control and hold back and –

Q And what did you do?

A Then I forced her to have sex.

Q In, was it, and how did you force her, in what fashion?

A It was more just, you know, grab and pull.

Q Wree [sic] you choking her, too?

A I don't believe so, no.

[985] Q Was she saying no, struggling against it?

A Yes, at first, but then she went along.

Q After you sort of overpowered?

A Yes."

(Thereupon, the tape-recorded portion was concluded.)

MR. HANCOCK: That's all the questions I have, Your Honor. Thank you.

CROSS EXAMINATION

BY MR. RICH:

Q This second rape incident here, that's the one he was placed on probation for here in Broward County?

A Yes, sir.

Q Do you know what kind of probation he had, Captain? Was it five years?

A I honestly don't know. I know he was placed on probation.

Q And this first case is still pending in Michigan; right?

A Yes, sir.

Q Those two people that you indicated, of course, are still living; right?

[986] A Yes, sir.

Q In all of these occasions where he described this behavior, he is always in a bar where he had been drinking; right?

A The situations that I'm aware of involved a bar.

Q In the first instance, he told you he was very drunk? The one in Michigan, he said he was very drunk?

A Yes, he did.

Q And even the second incident, he said he was in a bar, and he was drunk?

A The second incident, he said he was in a bar.

Q Didn't say he was drunk?

A I don't he was real clear though.

Q He was in a bar, though?

A The bar is essential to the scene, those three cases, yes.

Q And in the first one – in fact, in each one, he describes to you that something comes over him that he cannot control?

A Yes.

Q Have you read the psychiatric reports in this case, Mark?

[987] A I haven't read the psychiatric reports, no, sir.

Q But in each instance, he says this irresistable [sic] impulse comes over him that he can't really control?

A Yes.

Q And that later on, when he sobers up or the next morning or the next day, he is extremely sorry and extremely repent about it?

A He basically said he gets these urges. Sometimes he doesn't, but he suggests that he is sorry, yes.

Q And the statement further on in this case, he describes this irresistable impulse that comes over him that he can't control, and that he's drinking?

A Sometimes.

Q Even in this case.

A Sometimes it's irresistable, sometimes it's not. Fortunately, it's not always irresistable, but when he can't control, we see what happens.

Q It always seems to stem from drinking?

A Well, the cases that I'm involved with involve a bar, yes.

Q His motis operendi [sic] seems to involve drinking and no control, an irresistable impulse, and [988] then repentance afterwards? That seems to be the MO.

A That's a compound kind of a statement, but –

Q Well, you're a lawyer, so you know what I am talking about.

A Certainly he meets women in the bar. He gets this urge. If they resist, he rapes them, and sometimes kills them.

Q Well, you only know of one homicide.

A That I know of, yes.

Q You don't suspect any others, no evidence of any others?

A I don't know of any others.

Q And he's indicated to you in his statement he was only able to control this for the last five years he has been on the run?

A He indicated one incident in Atlanta that he was able to control it, and we have no evidence charging him with any other crimes there.

MR. RICH: Thank you very much.

MR. HANCOCK: Thank you very much. We next call, Your Honor, with your permission Detective Vicki Russo.

(Thereupon, the State of Florida, further to maintain this issues on their part to me maintained, [989] called as a witness DETECTIVE VICKI RUSSO, who, being first duly sworn, was examined and testified as follows:)

DIRECT EXAMINATION

BY MR. HANCOCK:

Q Please state your name and spell you last name.

A My name is Vicki Russo, R-u-s-s-o. I work for the City of Fort Lauderdale Police Department.

Q And how long have you worked with the Fort Lauderdale Police Department?

A Over fourteen years.

Q And what's your duties presently consist of with the Fort Lauderdale Police Department?

A I'm a detective in the homicide squad.

Q Now, I take your attention back to March of 1980. What were you duties?

A I was in the homicide squad, but at that time, we also worked sexual batteries.

Q And did you have occasion to become involved in an incident that brings you here to testify?

A Yes, I did.

Q And can you please tell the ladies and gentlemen of the jury when you became involved?

[990] A It was on March 14th, 1980.

Q How did you become involved on March 14th

A I arrived at work that morning approximately eight o'clock a.m. I was advised by communications that there was a sexual battery victim at the Sexual Assault Treatment Center, which at that time was in Pembroke Pines, Broward County, Florida. I responded out to the center and met with a victim by the name of Rhonda Rowe (phonetic).

Q Can you describe her, if you would?

A She was a small girl, about nineteen years old, about five foot two, very petite, had blond curly hair, a little bit past the chin, very, very cute girl.

Q Now, looking at State's Exhibit 27 in evidence, I ask you to look at that and does that resemble Rhonda Rowe?

A You can see that her eyes were blue, and Rhonda Rowe's eyes were blue.

Q How old was she?

A Nineteen.

Q Where was she from?

A She was from – originally, she was from New Jersey, but she has had family in Connecticut.

Q What was her physical condition when you came in contact with her?

[991] A Very, very emotionally upset. She was crying, shaking, very fearful. It took me a while to calm her down. I did subsequently bring her back to the police station.

Q And what type of clothes did she have on at that time?

A She just had on some clothes that were given to her by the Sexual Assault Treatment Center because she had no clothes available to her at that time.

Q And as a result of your investigation, what did it reveal happened?

A She had been at a bar by the name of Duck Goose, which is in the thirty-five hundred block of Northwest Ninth Avenue, which is in the City of Oakland Park, Broward County, Florida. She had been there the previous evening, March 13th, with her boyfriend. They had been playing pinball, and she went out to her car to put her purse away, lock it up in the car, and to go back in the lounge, and as she walked out of the lounge, she noticed a white male laying on the sidewalk there in front of the bar. She assumed he was passed out, really didn't pay much attention to him, walked around him.

As she did, this white male said, "Hey, [992] Sweetheart." She ignored that, continued on to her car, unlocked the driver's door, and was putting her purse in the front seat of the car when the next thing she knew there was this white male behind her choking her and pushing her into the vehicle.

Q Where was he choking her at?

A Around her neck.

Q What did she say happened?

A She said she was forced in the car, and this white male threatened to cut her, stab her, pushing her into the car. He took the keys out of her hand, started the car up. She tried to beep the horn and didn't succeed, to get someone's attention, but no one came to her aid.

The car started up. She attempted to get out of the passenger side door, at which time the white male grabbed her, and then stepped on the gas, screeched out of the parking lot, forced her head down on the seat.

Q When she was being choked, what did she say happened to her?

A She said she was having difficulty breathing.

Q What happened then?

A The car drove around. She wasn't [993] absolutely certain of the exact route it went, but it ended up in the sixty-five hundred block of Northwest Ninth Avenue, which is also known as Powerline Road, and which is in the City of Fort Lauderdale, Broward County, Florida.

She said the car pulled into a warehouse area, up to a camper shell that goes on the back of a truck, but there was no truck there. The camper shell was just propped up there. The car was kind of pulled back into the wooded area, and she was taken out of the car by this white male and brought into the camper shell.

Q And did she ever indicate what he told her would happen, if she resisted?

A He would kill her. He would stab her, choke her.

Q And did she ever indicate that she was crying, and he made certain threats to her?

A Yes, he became very upset when she was crying and screaming.

Q And what did he do when she was screaming and crying?

A He would choke her. He made more threats to her. When he got her inside the camper shell, he ripped her clothes off, forced her into like the upper [994] level of the camper shell, which was a bed area, and sexually assaulted her numerous times.

Q And how did he sexually assault her, did he say?

A He sexually assaulted her vaginally, anally, orally, and then kept repeating this. He would change her position, and just kept doing this over and over again. She said that he did not climax. No evidence of any sperm was found in her at the treatment center, and he became very angry with her that he hadn't climaxed and threatened that he would cut her breasts.

Q Did her indicate anything about her breasts?

A He became also upset that – he told her they were too small, and he bit her very, very hard on the breast repeatedly, and also on the vaginal area.

Q And how hard did he bite her down there?

A To the point where she said it was – she said it wasn't so much out of sexual lust, it was out of violence. He was just trying to hurt her because he was angry that he was not able to climax with her.

Q Now, there came a time when this individual was arrested; is that correct?

A That's correct. He passed out on top of [995] her. She said she layed there for a long time with him on top of her, didn't know if he was trying to trick her, so she finally managed to get herself from underneath him. She said it took quite a while. The only thing she could grab was her – she grabbed her blouse and her bra and ran out, flagged down a passing male that was driving down the street, who picked her up and took her to a location where they did call the police department.

Q And when you took the statement from her, did anything happen?

A Yeah, I had to stop taking the statement because she was so upset. She became sick to her stomach right there. I had to turn off the tape recorder.

Q She was throwing up; is that correct?

A Yes, that's correct.

Q Now, there came a time when this person was arrested; is that correct?

A That's correct. This man that picked her up took her to a phone booth. The policy were called, and they went back out to where she – she showed them where the incident occurred. Her car was there, and inside, they found the subject asleep in this camper shell. The remainder of her clothes were also located [996] and also her jewelry. She had a necklace with a locket on it.

Q Who was arrested, what was his name?

A At that time, when he was arrested, he gave the name of John Doe, and later the name of Dennis Grant.

A [sic] Do you see that person in the courtroom today?

A Yes, I do. He is sitting to the left of Mr. Rich.

MR. HANCOCK: Your Honor, may the record reflect she's identified the defendant, Dennis Sochor? Thank you.

THE COURT: Yes.

CROSS EXAMINATION

BY MR. RICH:

Q How did you know I was Mr. Rich?

A I have met you before.

Q Ms. Russo, so it seems that you say he passed out on top of a girl. Would that indicate to you that he was intoxicated?

A I asked her if she though he was intoxicated. She said she did not spell [sic] any alcoholic beverage of any type. She just said she didn't know if he actually passed out or just fell asleep.

[997] Q When they went back to that location, he was still passed out?

A That's correct.

Q Did you go back?

A I was not there at the scene, no.

Q You have no idea what he passed out from, whether it was drugs or alcohol?

A No, sir, I do not.

Q But you know that he did pass out, and he had been drinking?

A That I didn't know either.

Q She didn't say he had been drinking?

A She didn't, no.

Q Now, this is the one that he was placed on probation for; right?

A That's correct.

Q Five years?

A That's correct.

Q For sexual battery, five years probation?

A That's correct.

Q During that particular sexual battery assault, did he ever receive any psychiatric evaluation?

A That, I don't know. I have no idea. I did not know he was placed on probation until after the [998] fact.

Q You mean the State Attorney never consulted with you, as they normally do about probation?

A No, they did not.

Q Don't they normally consult with you on a case about whether or not you would approve probation or disapprove probation?

A Generally, yes, they do. I have always had them –

Q Every case you have had with me, they have always contacted you, haven't they?

A That's correct.

Q And then you make your feelings known to the State Attorney's Office, whether you would approve or disapprove of probation; right?

A That's correct.

Q In this case, had you known about it, you certainly wouldn't have approved probation, would you?

A Definitely not.

Q You would have had him Baker Acted [sic], if you could have?

A I would have voiced my opinion very strongly. I would have been very against probation.

Q And you would have had him psychiatrically [99?] examined?

A Well, that wouldn't have been under my jurisdiction.

Q Well, you would have recommended –

A I would have asked for it, sure.

Q So, in this case, for some reason, unbeknownst to you, you were never contacted about this probation?

A No, I was not.

Q And it wasn't me that represented him at that time, it was the Public Defender's Office?

A Yes, that's correct.

MR. RICH: Thank you, Vicki.

REDIRECT EXAMINATION

BY MR. HANCOCK:

Q I wasn't the prosecutor, was I?

A No, you were not.

Q Now, as a result of what happened in the case, did you ever receive any calls from the victim?

A Numerous times. She called me every other week after the – when I took her statement, she indicated to me she was moving back to Connecticut, which she did do, and she kept in contact with me throughout. I was receiving supoenaes, like I normally do, pending court, and then I never received [1000] anything for a while. I got a phone call from her. She called me and wanted to know what was going on with the case. I said I don't know, but I will find out, and I found out and called her back.

Q What did you tell her, when you called her back?

A I did not tell her the truth. I told her that he received – I told her that he pled out, which was the truth, but I told her that he received five years in prison, and she was very upset with that.

Q Now, you found out later that in fact it wasn't the judge's fault that certain statements had been made in reference to the case; is that correct?

A That's correct.

Q And what were they?

A That she refused to come back for trial.

Q But you had contact with her though [sic] the whole time?

A that's [sic] correct.

MR. HANCOCK: Thank you.

RECROSS EXAMINATION

BY MR. RICH:

Q Even though she refused to come back, Ms. Russo, you could have compelled her appearance in court by subpoena, could you have not?

[1003] A Well, she never indicated that she refused. She was very anxious to pursue the case.

Q So, how did you get the idea that she didn't want to come back to prosecute this case?

A I heard that later.

Q From whom?

A From Mr. Hancock.

Q Well, I don't quite understand why. She was willing to come back to prosecute the case, but somehow the State did not subpoena her to come back to testify?

A That's correct.

Q You don't know why?

A No, sir, I do not.

Q But it certainly wasn't because of an unwilling victim to come back?

A No, it was not.

Q And you attribute that to just a plea bargaining deal that was made between the State of Florida and the defendant?

A That's correct.

MR. RICH: Thank you, Vicki.

MR. HANCOCK: Thank you very much. Your Honor, with the Court's permission, we would like to introduce in evidence the certified copy [1004] of the felony conviction on Dennis Paul Grant, done and dated order on September 30th, 1980, when he pled to sexual battery and receive a period of five years probation, with a special condition of one year in the county jail.

MR. RICH: No objection.

THE COURT: Maybe [sic] received.

THE CLERK: State's Two.

MR. HANCOCK: And also, Your Honor, through stipulation, the State and the Defense would introduce in evidence the doctors reports that previously testified in the guilt phase, and that would be State's Exhibits B, C, and D, for identification.

MR. RICH: Make it a joint exhibit.

MR. HANCOCK: Okay, joint.

THE CLERK: State's Composite Three.

MR. HANCOCK: Your Honor, at this time, that's all the State would have. Thank you.

MR. RICH: Your Honor, my witnesses are going to be quite lengthy. Maybe we should take –

THE COURT: Call your first witness.

MR. RICH: Gary Sochor.

(Thereupon, the Defendant, to maintain the [1005] issues on his part to be maintained, called as a witness GARY SOCHOR, who, being first duly sworn, was examined and testified as follows:)

DIRECT EXAMINATION

BY MR. RICH:

Q For the record, Gary, please state your name and where you reside.

A My name is Gary Charles Robert Sochor. I live at 660 West Grand River, Iona, Michigan.

Q I ask you to testify and tell us what your life was like when you and Dennis were growing up, what you

can recall, and you can tell us whatever you say from your heart.

A The first thing I'd like to say is to try to understand this is pretty hard also because of the love I have for my parents, but looking back, I sometimes often wonder how I made it because my whole childhood was memories of nothing but getting beat.

Q You, personally, Gary?

A Yes.

Q How about Dennis?

A More than I. As a matter of fact, Dennis took a lot of my beatings.

Q You mean he took the beatings for some things that –

[1006] A That he didn't do.

Q Something that he didn't do, that you did?

A Yes.

Q And he took the blame for it?

A Yes. He was the big brother. He protected the younger – he was the oldest boy. He protected the younger children. There are ten children in the family. He protected my sisters, and I remember my sister had trouble in her marriage once, and her husband struck her, and he went over and had a nice long talk with her husband, and they are still married today.

Denny had some words with him, told him about ever touching his sister again, and I look back, we

weren't angels. We were just normal country kids out playing, making up our own games, and sometimes things would get started, and we'd get the normally brotherly fights.

I can remember my mother, when my dad would get home, yelling at my dad to spank us for this or for that, and he would start in with the belt, I mean a big belt, and just beat, beat, beat. Sometimes I'd end up with twelve or more welts, and I can remember my mother, in the middle of it, screaming for him to stop, and I never could understand why she would [1007] insist that we get beat, and then in the middle of it, insist to stop, and sometimes I remember my dad, you know, coming home from work. You could tell he had a bad day, and he wouldn't stop and –

Q When you say beat, did he beat you and also Dennis?

A Yes. Dennis always seemed to get – I remember watching, and I just could tell that Dad seemed to swing a little harder at him. I don't know why.

Q Harder at Dennis, than he hit you?

A Yes, and I can remember when Denny finally decided that he just had enough of the beatings and started fighting back, and I remember a lot of times with my mother, one time real in particular, and that one just almost made me sick, but he was having an argument with my mom. It carried on for ten minutes or so, and mom asked him to just shut up, quiet, I've had enough of it.

Q Who was she arguing with?

A Denny, and Denny was just trying to make his point, and I don't even remember what it was about, but I can remember Denny being right because that's just the way I remember, that Denny wouldn't stop because Denny was trying to make his point. I can [1008] remember that I was agreeing with him, and mom just kept telling him to shut up, and she picked up a fork and threw it at him and stuck it in his chest.

I mean, you know, nine times out of ten it would have bounced off, but it stuck in his chest, and he just pulled it out and threw it on the floor and walked out and –

Q Did you notice what type of behavioral changes Dennis has as a result of this abuse in childhood?

A Well, he would always, like I did, always you know try to forget and come back and love our parents the way we did for everything. You know, they did a lot of things with us, with ten kids. They did a lot of things with us, and so it was like a love/hate relationship. One minute you hate, the next, you love, and as we got older, I can remember dad got in a jam at work and lost his job, and Denny was working at the time, and Denny just started handing over his paychecks. Dad tried to give him some spending money, but he wouldn't take it, and back to the question of behavioral things, you know, Denny started like going away and not coming home, and when he did come home, we always – he always ended up in a fight with dad, and I can remember times when he'd leave for a year or two at [1009] a time, and he'd come home, one time in particular. It was shortly – he was gone for about two years. Nobody heard from him,

and he come home, and it was shortly after my father had a house fire and lost everything, didn't have it insured and lost everything, and Denny come home, and after Dad going through the ashes of the fire, he couldn't find any of the remains of a fairly large money collection, old silver that he had, and he questioned me about it, and I told him I didn't hear anything from any of the kids.

He asked me if I heard anybody or knew of anybody who had been taking it because he never found any of the remains in the ashes. I told him I didn't hear of anybody. He asked me if I thought any of them would. I told him I don't think so, and he says, "Well, how about Denny." He said, "You know, he has been gone. He had his troubles. He needs money." I said, "Well, geez, I don't think so, Dad. You know, he's done a lot for the family, supported the family, even when you lost your job," and Dad kept – I kept telling Dad over and over that I didn't think so, and Dad finally convinced that it was gone because I kept asking him, "Well, did you do something else with it, place it anywhere else, put it in a safety deposit box," and he said no. He told me where he had it.

[1010] Well, he ended up accusing Denny of stealing it, and this is shortly after he got back, and Denny come to me and asked me how in the hell dad could even consider anything like that, and I questioned Denny because, you know, it's gone. "Denny, you know, it's gone. Where is it." He walked out the door, and he was gone again.

Q What year was that, Gary?

A I believe the house fire was roughly nine, ten years ago.

Q Had you seen Denny since that incident?

A No. After that incident, I he seen him again.

Q And he never came back home?

A No, he never came back home after that.

Q Anything else you want to say?

A Yeah, my dad ended up finding the money. He gave it to my aunt.

Q The money that he accused –

A The money that he accused him of stealing, he found, and how are you going to tell Denny now, you know, and there is a hundred stories I could tell about running in the woods and hiding for days because we didn't want to get beat, for stupid things like not weeding the garden, not feeding the damn dogs.

[1011] Hell, I took care of an acre yard, would spend the whole damn day keeping it nice and come home and be told that I didn't do enough. I love my parents dearly, but I have three children, and I don't beat them. I have never spanked my children, and I can see they definitely won't have the problems that I have had, and that he's had.

Q So, the first time that you saw Denny then in ten years was when you came down here for a visit, around Christmas of eighty-one/eighty-two?

A Yes.

Q Did you keep in contact with him? Did you write? Did you phone or talk to him at all?

A Didn't no [sic] where he was, no.

Q How did you finally find out where he was, back in eighty-one/eighty-two, Christmastime?

A He called, just said he got out, asked if –

Q Out of prison?

A Yes. I don't know if it was prison.

Q Got out of county jail?

A Yeah, I believe that's what it was. Asked if someone could come down and see him. It was Christmas vacation. I worked at GM, and we have a couple of weeks during Christmas, and I thought – I [1012] left my wife and kids to come down to see my brother that I hadn't seen.

Q In how many years?

A Hadn't seen him since the house fire.

Q Ten years, eleven years ago?

A At least.

Q Do you want your brother to die?

A He doesn't deserve to die. I don't want him to, for the good he had done. It's not his fault. It really isn't. I still have problems loving my parents today, but it's only because they're my parents. My wife today asked me how come I keep going back, because even today, sometimes they treat me with not the love you think a parent should, and my wife questions my motives why – she asked me why are you trying to make them love you. I mean that's pretty pathetic, when your wife has to ask

you how come you're trying to make your parents love you.

I have one brother that doesn't even go over to the house anymore. There were three of us, a year apart. Dennis is a year older, and I'm in the middle, and then we have another brother who's a year and two months younger than I, and there were three of us right together, and we were very close.

My younger brother is a year and two [1013] months younger. I kind of look at it like he got smart. He doesn't even go over there anymore.

Q Your younger brother, is that what you mean?

A Yes.

Q If you had one thing or one request to ask of this jury, what would you ask them to do?

A To not condemn my brother, and to give the family time to show him that we do love him.

MR. RICH: Your witness.

CROSS EXAMINATION

BY MR. HANCOCK:

Q Just a couple of questions, Gary, and if you don't understand something, just tell me.

Now, Gary, you would say that your brother has a violent temper, would you not? Would that be a true statement?

A You know, he did, when we were young. I mean it wasn't until after the beatings that both of our tempers

– I mean I had a pretty violent temper myself, but I finally came to the conclusion that –

Q What did you wife think of Dennis?

A I'm not sure.

Q She was afraid of him, wasn't she?

A She had said on occasions that –

[1014] Q And that's because she thought he was quite violent; isn't that correct?

A I don't know why she was afraid of him.

Q But it came to the point where he used to get in a lot of fights; did he not? Besides your family, didn't he get in a lot of fights, fist fights?

A So did I.

Q But to answer my question – you know, if you need to explain something, I'm not here to cut you off.

A Okay.

Q Didn't he used to get in a lot of fights; isn't that correct?

A Yes.

Q In fact, there was a point you were afraid of him when he got to a certain stage; is that correct, when he had this rage that you –

A Yes, after –

Q In fact, on several –

A As he got older, yes.

Q It got to the point where you would run away from him; is that correct?

A Yes.

Q And at that point, he would go into a rage, and he had an extremely violent temper, did he [1015] not?

A Yes.

Q And now, what you said about your parents, when your dad would come home, supposedly there were certain things you were supposed to do because you all lived on a farm; isn't that correct?

A It wasn't a farm. It was two acres.

Q Two acres, but there were certain chores you had; is that correct?

A Yes.

Q You said you dad used to discipline you; is that correct?

A I don't know if discipline is the word.

Q Well, if you did something wrong, it wasn't your mother, it was your dad that would discipline you; is that correct?

A No, my mother broke a couple of broomsticks.

Q Didn't it come to the point where Dennis was beating up the other kids in the family; not only you, I mean the younger kids, when he would lose his temper and start beating up all the other kids? Wasn't that when your dad finally got to the point where he told him he had to leave because he was beating up the other kids, yourself and the younger ones?

[1016] A There was a time – yes.

Q In fact, he would just start beating them up for no reason; wouldn't he, the little kids?

A I don't remember not being a reason.

Q Well –

A I mean, there was always a reason for the brothers fighting.

Q But why would he beat up on the younger brothers, that you recall him beating them?

A I really don't know why. I mean, you know, I don't know. I wasn't around at the time it started. You know, I just would hear a fight and run over to help.

Q Would you help the other children?

A I would help the others.

Q And you would stop Dennis from beating them; isn't that correct?

A Yes.

Q You would try to be the peacemaker of the family, would that be a fair statement?

A Sometimes I was the troublemaker.

Q But when Dennis was beating the younger kids – and you had about ten kids total; is that correct?

A Yes.

[1017] Q And Dennis was the older one, and you were what, the second to the oldest, and then there was Brian; is that correct?

A No, Dennis was – there is my older sister, Dennis, then I, and then another boy.

Q And is that Brian?

A No, that's my brother, Terry.

Q Well, didn't Dennis used to beat Brian a lot, and Brian wouldn't fight back?

A Brian had a big mouth.

Q But Brian would never fight back?

A Right.

Q And Dennis would beat him and beat him, until someone stopped him, wouldn't he?

A I only remember him hitting him a couple of times.

Q When he would do this, he wasn't under the influence of alcohol, was he, when he would get in a fight with the younger children?

A It's hard to recall if it was, you know, after he had come home from being out. I couldn't recall.

Q Well, even before he started going out, was there a point when he was beating up the younger kids, and at that point, he wasn't under the influence [1018] of any alcohol, was he?

A I would say there were plenty of times he probably wasn't drinking.

Q And we know in fact, through your parents and growing up, he would know it's wrong to kill, would he not? I mean we can agree on that; correct?

A I don't know. Sometimes after the beatings, I felt like dying. I don't know how to answer that.

Q Would he know it's wrong to rape a girl? He would know that's wrong; isn't that correct?

A I would say yes.

Q And even though your parents were quite poor; is that correct, and your dad wasn't working, and there were problems there financially; isn't that correct?

A Yeah.

Q And even though they were poor, they still tried to give you people as much as they could; isn't that a fair statement? Even though they didn't have it though, they –

A No, not when dad was off work. We had to live off Dennis' paycheck.

Q Now, when was the last time you say him, Gary, before you came down here?

[1019] A It was right around that house fire.

Q And what year would that have been, Gary? You said about ten years ago?

A I don't recall what year the house fire was, I really don't. That was such a traumatic thing for my father.

Q Where you aware that he had been arrested for rape in Michigan in 1979?

A No.

Q And when you came down here, what did he tell you he was in jail for?

A I believe it was prowling what he told me it was for.

Q He never did tell you that he had been convicted of sexual battery; is that correct?

A No, I don't recall him saying that.

Q And during this period of time that you didn't see him, were you aware that he was a fugitive from the State of Michigan, and later became a fugitive from the State of Florida?

A No.

Q So, do you know – and if you know from your own personal knowledge, just tell me – do you know that one of the reasons maybe he didn't come back was because he was a fugitive on a rape charge in [1020] Michigan, if you know?

A I didn't know.

Q Did you know him to use any other names?

A Mine, on one occasion.

Q And that was a certain incident that happened; is that correct?

A I got a notice in Michigan – I forget what year – to come down on a prowling charge.

MR. HANCOCK: Thank you, Gary.

MR. RICH: Thank you, Gary. Kathy Cooper.

(Thereupon, the Defendant, further to maintain the issues on his part to be maintained, called as a witness KATHY COOPER, who, being first duly sworn, was examined and testified as follows:)

DIRECT EXAMINATION

BY MR. RICH:

Q Please state your name and spell you last name, please.

A Kathy Cooper, C-o-o-p-e-r.

Q What's your relationship to Dennis?

A He's my brother.

Q And when is the last time that you had occasion to see your brother, prior to today?

A Ten years ago, maybe.

Q Ten years ago?

[1021] A Yes.

Q Hadn't seen him since?

A No.

Q This is the first time you have seen him in ten years?

A Yes, it is.

Q Going back to your childhood, would you please describe for the jury what your life was like when you and Dennis were children, and if you have something

that you want to read to the jurors, you may do it. Do you have a prepared statement?

A Yes, I do, but I think I can say it all right.

Q You have to speak up, so they can hear.

A Yes, I do, but I think I can tell about it. Denny had a pretty rough life. There were three of us children, me, Denny, and Gary, and all under three years old, and for some reason, I don't know why, all mom and dad's frustrations and everything got taken out on Denny.

The main thing I want to tell you about is some of the beatings that he took. There is nights that I'd go to bed, and especially since all this trouble started, and I think about Denny, and it all runs through my mind like a movie picture.

[1022] My dad used to be a boxer. He is very strong. He knew how to hit, and he has a very quick and violent temper. There were times where literally you'd have to pull my dad off of Denny.

There are three particular times I remember. What really bothers me about the whole thing is my memory. I'm the oldest. My memory only goes back so far. I don't know what happened to Denny before all these times that I remember. I'm shaking so bad, I'm sorry. Dad used to get Denny into a corner that he couldn't get out of, and just constantly hit him with his fist. He'd hit him in the face, in the arms, and you know, my dad would just be in a rage, anyplace he could hit him. Denny constantly had his lips split open, black eyes, bruises all over his body.

There was another time that I remember very clearly that dad had Denny down on the floor and was strattled

over top of him and just, you know, like plummeting with his fist. Denny couldn't get away, and the worst time I remember was one time he had Denny in the corner, and he was beating him, and Denny was trying to fight him off, and he just kept banging his head. He got ahold of Dennis' hair, and he kept banging his head against the wall, and he let go, and then Dennis just sort of slid to the floor, and then [1023] dad just started kicking him. He just kept kicking him and kicking him, and I can remember looking into the kitchen at my mother and thinking why don't she make all this stop.

Q How old were you then?

A I don't know.

Q But you remember this vividly?

A These three times, I remember very clearly, and she didn't do anything, so you know, again, I just went – just literally pulled dad off him. I was afraid he was going to kill him, and I can remember dad left the room. Denny just layed there until dad left the room, and he tried to get up, and he couldn't get up, he hurt so bad, so he started crowling [sic], and I went to him, and I said, "Let me help you," and he wouldn't let me help him. He said, "No, just leave me alone."

Q Did Gary see this, too?

A I don't know if Gary saw it or not, you know, this particular time. It was very common for Denny to get a beating. Nobody else got a beating, but Denny did.

Q Why was that, do you know?

A It's my feeling that Denny come right in between three kids. We were real close, and then there [1024] is ten of us kids all together, within – well, I am thirty-seven. I think my younger sister is twenty, so within seventeen years, there is ten kids. They had a lot of problems. There were a lot of financial problems.

Q Did Denny sometimes take the blame for something that Gary had done?

A I think so.

Q And would he take a beating that maybe Gary should have taken?

A Yes.

Q What makes you think that Denny would speak up for Gary and take the blame and beatings that Gary should have gotten? What indicated that to you?

A It sounds crazy, under the circumstances, but Denny is a very loving person. Family means a lot to him. I don't know why he would stick up for Gary in particular, but I know he did it. You know, I know it for a fact, and as far as beatings, you know, maybe Gary knows of instances in particular, where Denny stuck up for him.

Q And would take a beating, instead of Gary?

A Yeah. You know, Gary might know a particular instance, as I don't necessarily. I just know, you know, how it is with brothers and sisters, [1025] and somebody will say, "Well, I didn't do that. Well, you know, they did it," you know, but once – I don't know. I feel a lot of guilt. I carry a lot of guilt because of the way things were for

Denny, but you didn't know about child abuse then like you know now.

When something happened in your home, you just tolerated it, at least that's what we did. You didn't have TV commercials and everything saying go talk to somebody, find somebody to talk to, tell them what's going on, and when I was a kid, I knew it wasn't right, but yet I knew Denny got in trouble, and he didn't do stuff he was supposed to do, and so that's just the way it was, and it wasn't until I became a mother and have my own kids that I realized what was done to Denny.

I personally cannot tolerate having to spank my kids, for any reason. If there is any way out of giving my child a spanking, I will do it. I mean, I have three children, and I could probably count the times on one hand that they have had a spanking.

Q Would you want this jury to come back with a verdict of death for you brother?

A No, I don't. I feel very, very badly for the parents of this girl. My husband and I lost a child, and I know the agony they are going through. It [1026] wasn't as brutal as this, but I do know what that loss is like, but I feel Denny, if he was ten years old, this Court would do something to help him, but because he is a grown man, he's an adult, and he has to stand responsible for what he has done.

I don't think that's possible because I think actually Denny is still that ten year old child still looking for the love and the security – I don't want to say love because our parents did love us, and I think I know Denny feels

that love, but there was a security and the bonding that they talk about children having with their parents. Denny didn't have that.

Maybe his problem with women is because his mother didn't come through for him. Maybe she didn't stand up for him like she should have, and we all know the younger kids in the family, you know, they don't – in my family, they don't know it. You know, they don't understand a lot of these things. They just know what and hear the things that Denny has done, but in my heart, I honestly believe it all goes back to when he was a child, the brutal abuse and battering that he took.

There were times he didn't do something he was supposed to do, and he'd get yanked out of a sound sleep and get knocked around and be forced to get it [1027] done in the middle of the night. I think maybe Denny is one of these kids – and anybody that's got more than one child will probably know what I am talking about. There is always one kid that you just throw your hands up and don't Know what to do with them.

My first two children – I have a seventeen year old daughter and a thirteen year old son, no problem, perfect angels. You tell them no. They know the meaning of no. I have got a seven year old right now that just if he doesn't make my hair turn gray, nothing will.

Q Did there come a time, Kathy, when you parents tried to seek psychiatric help for your brother?

A Yes.

Q Can you tell us about that?

A I don't remember the exact circumstances. I was married and gone out of the house by that time.

Q Do you have any idea how old Dennis was at that time, approximately?

A Well, I was nineteen when I got married – or no, I was eighteen, when I got married, Denny may have been about twenty. I am not sure. I am really bad. Things are always farther back than I think they are.

[1028] Q Tell us about the incident where your parents tried to seek psychiatric help for Dennis.

A Something happened at my parent's house. I don't exactly remember what it is, but Denny just flew off the handle and beat my brother, Brian, up, and my mom called me on the phone, and she said – I don't even know if my mom was home. I think mom might have taken all the kids and got them out of the house and called me, and Dad was working, and I was closer, so she says, "You got to get over here right now." She says, "Denny just beat Brian up, and he's got to go to the hospital," so I went to my mom's.

They were at the neighbor's up the road. We lived out in the country at the time, and so I picked – I came and went to my mom's. I got Brian, and I took him into emergency, and my dad met us there at the hospital, and I think Dad talked to mom on the telephone. I think he called the police from the hospital and said that they wanted to press charges Denny because things just were getting worst, and so the sheriff's department went out to the house, and they picked Denny up. He was there by himself because nobody would go back home, until he

had been picked up, and that night, the Iona County Sheriff's Office, I believe it was that night, it might have been the [1029] next day, I am not sure. They take him up to Ipsolani (phonetic), Michigan. I believe they have a psychiatric center there or something, and all the trouble that Denny had been in and in doing something like this to his brother and everything, mom and dad wanted to see if there wasn't some way – he wouldn't go get mental help on his own, so mom and dad wanted to see if there was some way where they could prove him like incompetent or something and have to force that help on him, and they took him up to Ipsolani. I think he spent a day up there, and they tested him, and they brought him back, and they told us that he wasn't bad enough to where he needed help, and so the sheriff's department told him that he had to leave home, and he was not to have contact with his family again.

Q The Sheriff told him he had to leave home and never see his family again?

A Yes, they told him that if he couldn't stay at home and get along, that he had to find some place else to live.

Q When he was about twenty?

A I think so. I am not – I am really not sure what the age was.

Q After that incident, was that the last time you seen Denny?

[1030] A No, I think I saw him one more time after that. I'm trying to remember when he was in the Army and everything and dates and for me to go back and remember what happened, before I really get confused,

but I think it was after that that Denny went and lived in Flint (phonetic), and I remember he came home for my daughter's first communion. We had a big party for her first communion.

Q Did all of you children have a foundation in the Catholic religeon [sic]?

A Yes, we did.

Q All had communion, and all were baptised in the Catholic –

A Yes.

Q Did you all attent [sic] church on a regular basis?

A Yes.

Q All you children?

A Yes, up until, you know, after we got – you know, once the kids had graduated or moved out of the house, you know.

Q But I mean the basic upbringing was in the Catholic church, when you were young?

A Yes, my mom was, and she still is.

Q What's one thought that you would like to [1031] leave?

A Pardon me?

Q If there is one thought that you would like to leave with this jury, what would it be?

A I guess just that Denny has done a lot of wrong things, and this last thing that you found him guilty of is

almost unforgiveable, but I understand the anger and everything that's built up in him over the years. Something needs to be done, and God forgive me, something needs to be done, so this doesn't happen again, but to give him – I feel that to give him the death penalty serves no purpose.

I don't know if my mom and dad could handle it, after everything else, but all those years, all those beatings that Denny took, all those nights he crawled upstairs to bed, and he'd lay in bed crying, I think he died a little bit everytime then. I think to give him the death sentence now would be the final injustice you could do to a child.

Q Would you ask this jury to forgive him?

A Pardon me?

Q Would you ask this jury to forgive Denny and not give him the death penalty?

A Yes, I do. I beg you. He doesn't deserve the death penalty. He suffered so much already, if you [1032] had only been there to see it.

Q Now, Ms. Cooper, this is the first time we ever met, is it not?

A Pardon me?

Q Is this the first time we have ever met?

A Yes, I just arrived noon today.

Q I've never even spoken to you before today?

A No, sir.

Q Except in open court?

A No, sir.

Q What you are saying to me now is from the heart?

A Pardon me?

Q What you are saying to me now is from the heart?

A Yes.

Q And is the truth?

A Yes.

MR. RICH: Your witness.

CROSS EXAMINATION

BY MR. HANCOCK:

Q Now, what you know of him then, you feel he was capable of murder; is that correct?

A He could be.

[1033] Q And now, he beat up Brian? In fact, he almost killed Brian, didn't he?

A I don't know. I wasn't there when it happened.

Q But Brian had to go to the hospital; is that correct?

A Yes.

Q And in fact, didn't he get to the point where Dennis was beating up the younger kids in the family?

A There were squabbles and things, but whether he actually beat up on the younger kids, I don't know. I was married and out of the house then.

Q Now, your parents tried to give you as much love as they could; is that correct, and the other children?

A Yes.

Q And I am sure you being a parent, no parents are perfect; isn't that correct?

A Right.

Q Everyone makes mistakes; isn't that correct?

A Right. I know I will. My feelings against my parents, really, they tried their best.

Q So, you are not blaming them; is that [1034] correct?

A No, I am not. I just think that that's the basis for all these problems.

Q In fact, your parents even went to the point where they even let Dennis stay with them? After you were married, he stayed with them, until he was like twenty years old; didn't he, at the house?

A They did that with all the kids.

Q Because you are a big family, and they never asked any of the kids to leave; is that correct?

A No.

Q Now, Denny, with his upbringing, what you know of him, he would know it's wrong to kill and rape; isn't that correct?

A I think Denny reaches a point where there is no right and wrong.

Q And that's when he loses his temper and goes into a rage?

A Yes.

Q Have seen him in such a rage?

A Only in fights with my father, after he got older.

Q Did you ever see him get in a fight with your mother and beat your mother?

A I never saw that.

[1035] Q Now, you said something, all the trouble he got in, they were trying to help him; is that correct?

A Yes.

Q So, there came a point in time where he was getting in a lot of trouble; is that correct?

A I don't know if it's trouble like you'd say police trouble and things, but just too much for them to handle anymore. It got to the point where there was definitely something wrong.

Q And were you aware if, in fact, back in say 1979, he was put on a probation period, and he was ordered to get certain treatments, and that he just took off and changed his name and went to some other state? Were you aware of anything about that incident?

A In Seventy-nine, where was he at that time?

Q It would have been I think up in Michigan at that point, some place in Michigan. Just let us know if you are aware of it. If you're not, just say you're not.

A I honestly don't remember.

Q Are you aware of any time where he was ordered to get treatment, and that he just left, just took off?

[1036] A No.

MR. HANCOCK: Thank you, Kathy. Thank you, Your Honor.

MR. RICH: Charles Sochor.

(Thereupon, the Defendant, further to maintain the issues on his part to be maintained, called as a witness CHARLES SOCHOR, who, being first duly sworn, was examined and testified as follows:)

DIRECT EXAMINATION

BY MR. RICH:

Q Mr. Sochor, you are the father of Dennis?

A Yes.

Q And I have asked you to come here today and tell this jury what you want to tell them in regards to mitigation. Have you written something up for us, a prepared statement?

A Yes, I have.

Q Would it help you to read you statement?

A Yes, I would have to read it.

MR. HANCOCK: I have no objection.

Q (By Mr. Rich) Would you please read your statement?

A This will be hard, so bear with me. First of all, I'd like to let Patricia's parents and relatives and friends know that many times I have [1037] thought about them. I thought about writing to them, but I didn't know what to say. If I did write, I didn't know how they'd take it, and then if I'd bring back and stir up bad memories, I wouldn't want to do that.

Second, the reason we were not here during the trial was because we could not take the pain that would generate. Also, I was afraid I would hear things that would haunt me. It was not because we didn't want to give Dennis support.

Denny is the second child born of ten, the oldest boy, followed one year and eight days later by Gary, then a year later, another boy. My wife had three boys in diapers at the same time, a time before diapers were disposable.

She washed everyday, had the clothes line full everyday, and worked hard. She worked hard day and night. Most of her attention was put on the baby. Denny needed attention and love at this early age, but he was always deprived because another baby would come, and he was always left out. The baby would get the attention. Denny would stand back and cry and would be ignored.

Also, there was always more demand put on Dennis, as we needed his help. Being the oldest boy, [1038] we always put more responsibilities on him, than he should have had. At this time, I was working two jobs in an automobile plant, a night shift, and construction or lumber mill during the day. Once, when I came home, Rose had had a bad day with the children misbehaving and all her hard work getting her down. She was crying and said

she had lost her temper and beat Denny, then banged his head against the wall.

That incident still haunts her today. She still brings it up. When the children started scouts and little league, it was too much for Rose. I quit working nights, so I could spend time with the boys, in scouts and little league, also to help Rose at home. Just getting all of them to bed and trying to keep them quiet was a big job.

There were times I came home from work, being informed of the things the boys had done, I would lose my temper and beat them, Denny always getting the worst of it. Years later, a neighbor told us – Denny took many beatings that Gary should have had – he said he would be in his barn and here [sic] the boys talking. Gary would be the instigator of some mischief, and Denny would get the blame.

There is no doubt in my mind that Denny had unjust treatment. There was an incident also when [1039] Denny was running with a tin horn in his mouth. He fell, and it went through the roof of the head or through the roof of his mouth, opening a hole that you could see right into his head. He was about four years old at the time. I took him to a general practitioner, a doctor that was just out of medical school and was starting a practice in Portland. He strapped him on the table and had his nurse and me hold his head, with me holding his mouth open, while he sewed him up. He did not give Denny any pain killer or anesthetic. You could see right into Dennis' head, through the hole. He screamed and thrashed, so we could hardly hold him, he was in such pain.

I wondered if the horn could have damaged something. Even though it does not look like it, we both love the children and work hard trying to make good citizens of them, but ten children born in a fifteen year span was very hard, and we had many good times and many bad times. Many times we spent time in hospitals with injuries or sickness. We had one boy burned, when his clothes caught on fire, playing with the coals on the electric stove. We did not know if he would live, for several days, then went through years of skin graphs.

Q Years of what?

[1040] A Skin graphs.

Q Thank you.

A Then the first of Dennis' problems come in his high school years. He broke into a doctor's office and stole pills. This was the first we knew of –

Q What kind of pills were they, Mr. Sochor, drugs?

A I believe they were diet pills, but they told me they were something the kids got high on at that time.

Q Okay.

A It was a real shock to us. It tore us up deeply. About the time Denny was eighteen years old, I was demoted in my position with the company.

Q Is that when you were working for –

A General Motors. I made a bad mistake decision, and I was demoted. The demotion caused the pay loss that would have been a financial burden. Denny went to work at the auto plant to help me out. He would give me

his paycheck every week, without cashing them. I felt guilty taking it. I would try to give him money, but he would refuse. He wanted me to have all of it. He only wanted a few dollars for candy and snacks. About eight months later, the company was losing money due to the person that took my position [1041] couldn't handle the job. I was reinstated and given a raise, and then with Dennis' help getting my job back and getting a raise, I was in real good shape. Shortly after this, I told Denny I did not –

Q You were working two jobs at this time?

A No, just one job.

Q Just the one job?

A Yes, and also at this time, my job also took a big toll because it was a job that took a lot out of you. Shortly after this, I told Denny I did not need this help anymore, as I was back in good shape. I told him to keep his money. He then quit his job and just started loafing around and running around with a crowd we did not approve of.

When I told him we did not need him anymore, we noticed the biggest change in him. It seemed that all he wanted was to be able to be needed, but instead, then again, he was rejected. I wonder how things would have been, if I would have been more understanding. About a year later, he left home. He just left without saying where he was going.

Q What year was that, Mr. Sochor?

A That was, I believe, around when he was nineteen/twenty years old, I would say.

Q How long has it been since you have seen [1042] your son?

A It's been over eleven years, I believe.

Q Is this the first time you have seen him?

A The first time I seen him was Saturday.

Q This last Saturday?

A Yes, in jail.

Q What was the incident, if you can recall and relate to us, that occurred that actually caused Denny to leave home?

A I think he just wanted to – at this point here, I think he just wanted to go out and see the world.

Q Continue on.

A Because if I remember right, he left on a happy note at this time. There were other times he didn't. He came back several times.

Q Was there an occasion when you accused Denny of stealing a coin?

A I wish you'd let me –

Q Go ahead. I'm sorry.

A Several years went by, and we never once seen a heard from him. It was if he had disappeared off the face of the earth. We had, after about four years, given him up for dead, thinking he had been killed while hitchhiking or some other foulplay.

[1043] One night, the phone range [sic]. Someone said, "Hi, Dad." I did not recognize the voice. I said

"Who is this." He said, "Your son." I said, "Which one." He said, "Denny, who do you think," just as if he had seen me yesterday. I broke down. I told Rose who it was. We both cried. He said he was going to join the Army. He called to tell me to send him his birth certificate. He was in California.

At first, he liked the Armu [sic] real well. Again, like everything else he tried, he lost interest. He told me he was going to make the Army his life. He came home after he was discharged, and this is when we seen the big change, where he was violent, especially of [sic] alcohol was involved. He went completely out of control. It started out with his abuses of his younger brothers. There were many times when I came home from work, and they wouldn't tell me that he had beat them up for no reason at all.

There were times in our home, on New Year's night, we were having a party, and Denny was getting out of control drinking. I took his drink away from him and told him to leave the house, as I thought that he probably would start getting violent.

Without any warning, be blasted me in the face and busted my nose. The next day, he came home as [1044] if nothing had ever happened, smiling, grinning just like he didn't know anything had ever happened. There were times I came home, Rose would be crying and telling me Denny had pushed her and hit her. Son number four was working nights and going to college during the day. One afternoon, he got out of his car. Denny walked out to the driveway, spit at him, hit him in the face and beat him up. We had to take him to the hospital.

Q That was Brian?

A Brian. He had to be stitched up. It was about this time that we knew Denny needed help. I took time off from work. Rose and I went to different agencies trying to find how to get Denny some help, to get him institutionalized or something, where he needed mental help. No one could help us.

One of the agencies said we should go to see Judge Banks (phonetic), Iona County Courthouse. We told him about Denny, and why he had to be put into an institution and give him mental help. If he could hurt the ones he loved, what would he do to others. He told us nothing can be done, until he does something.

After Rose broke down and told him then it will be too late, the judge told us he could have him picked up, if we would sign an affidavit and put it on [1045] a tape recorder of his mental state.

Q What year was this, Mr. Sochor?

A It was right around shortly after our 25th wedding anniversary, I remember that.

Q How old was Denny at that time?

A I would say right around twenty-five, twenty-six, roughly.

Q Okay.

A He was picked up, and then in less than a week, released from wherever they take him, to the mental – wherever they checked him.

Q It was a mental hospital they took him to?

A I think it was a mental hospital. I am not sure exactly what it was, but they released him on the conditions that he would report once a week.

He came home very angry at us, told us that we were the ones that needed mental help, and he left. He was very angry at us for having him committed for mental reasons. He then left home and moved to Flint. He would come home once in a while.

At this time, there were incidents where alcohol put him on a rampage. One of his friends told us about him getting in a fight in Flint, and when the police came, he beat up on several policemen, and it took four policemen to take him down, and he was drunk [1046] at that time.

On one of his visits, he brought a friend home with him. They stayed several days, and then left. After they left, I thought I'd better check my silver collection, and I checked where I had hid it, and it was gone. I went to Flint looking for him. I could not find him.

Q When you say him, you mean Dennis?

A Dennis. I was looking for Dennis and the fellow that he brought to the house because I was sure that they took my silver dollar collection. I could not find him, so I swore out an arrest for him. He was picked up, and then they let him go, lack of evidence.

Again, Denny came home very angry, telling me he did not take it. He then left Michigan hitchhiking, approximately eleven years ago. We have not seen him in all this time, until now. A few years later, February 28th, 1978, our homes was completely lost by fire. Everything was lost, burned to the ground. The only thing that we

came out of the house with was the clothes we had on. All the pictures and movies of the children growing up, and I had a lot of them. Once when we mentioned that we had lost everything, and my sister-in-low told me, "Not everything, I still have a bag you left here." I [1047] didn't know what she was talking about. She then went to the closet in her bedroom and brought it out. She said she didn't know what was in it. She says she never looked in it. It was my silver collection that I had Denny arrested for stealing.

I wanted desperately to find him and let him know what I had done, but I had no idea where he was. It was years before I heard from him. One day, I received a call from him, I would say approximately four or five years, and again, we were fairly confirmed and convinced that something had happened, that he had been hit by a car without identification or something and was killed, to go this long without hearing anything. Then one day, I received a call from him. He told us he was saved by the Lord. He seen the Lord.

He said he was wading out into the ocean to commit suicide. He said he wanted to end it all. He said he seen the Lord raise up in front of him on the water, and tell that he was supposed to live.

After this, he would call us and talk to us a long time. I believe he probably spent half of his paycheck on talking to us about the Bible and preaching to us. I do not think the incident would have happened if Denny would not have been persuaded to go to a bar that night, where the alcohol had changed his life back [1048] to his old life again.

Many times, I have wondered if I am the one that has contributed to Dennis' mental state. Denny does not deserve to be killed. He needs to be put into an institution and given the mental help that we tried to get for him thirteen years ago. He has had enough injustices. Killing him would be another, and it would be wrong. Two wrongs do not make a right.

I plead to the jury, the judge, and the Court, please take into consideration all that I have said, and do what is right. Thank you for bearing with me.

MR RICH: No questions.

CROSS EXAMINATION

BY MR. HANCOCK:

Q Just a couple of questions. You seem like a pretty decent man; is that correct? You say you try to be?

A No, I am hard. I was known in General Motors as an ironhand man. I am a hard man, to tell the truth.

Q A lot of discipline then; is that correct?

A I believe in discipline.

Q In fact, your kids, you disciplined them?

A Yes.

[1049] Q And they grew up disciplined then; is that correct?

A That's correct.

Q And if you thought they did something wrong, you would discipline them; is that correct?

A Yes.

Q And in fact, did you ever beat Denny just for the sake of beating him?

A Not to my knowledge. I may have, but not to my knowledge.

Q And –

A I did lose my temper many times. I have a temper.

Q And in fact, Denny had a temper too, did he?

A Yes.

Q He had an extremely violent temper, did he not?

A When he was under alcohol, when he had taken alcohol, otherwise he is the most loving kid. He'd do anything for anybody. He was very well-liked, very nice personality.

Q But did there come a point in time where he used to beat up on the other little kids in the family?

[1050] A He would push them around and –

Q I don't want to cut you off, but haven't you previously said that he used to beat up on the children?

A Yes, when he was in this real mental state, when we tried to get him put in a mental institution, we seen a big change, after he got out of the Army.

Q Haven't you previously indicated that you didn't think he had a problem with alcohol?

A No, I never said that, no. Alcohol was his destruction. He went violent.

Q I don't want to cut you off. Let me show you page nine of the statement. The police came up and took a statement from you, didn't they, Mr. Sochor?

A Yes. I'm ahead of you. I know what you are referring to. They led me to think he was an alcoholic. No, he was not an alcoholic. That statement, interpreted as when they said an alcohol problem, to me in my work, an alcohol problem was an alcoholic.

Q And you didn't think he had an alcohol problem?

A No, he was not an alcoholic, but he had a problem, when he drank alcohol.

[1051] Q But during the times, even before he went in the service, you had problems with him, did you not?

A What most people have with unruly kids, yes.

Q He was an unruly kid, would you describe him, as compared to your nine children?

A What are you talking about as unruly? Now, you have to –

Q You said unruly. I didn't use that term.

A All children are unruly. I have got children that are unruly.

Q Now, if he indicated in a statement to Dr. Zager, if he said he was weird and strange as a youngster, do you know what he meant by that?

A No, he wasn't.

Q He wasn't weird or strange as a youngster?

A No, he may have thought, but he wasn't. I never thought of him – he was one of the best little league players, the best guard on the basketball team. He could have probably been professional in basketball, if he had followed it through. He was very well-liked.

Q And you loved him very much; isn't that so?

A I went to scouts, camping trips, everything, took movies of them. I had hundreds, [1052] thousands of feet of movies of him, and I would show them to everybody.

Q You were very proud of him?

A Yes.

Q You tried to do everything you could to help him; isn't that correct?

A Correct.

Q When he was growing up, in fact you took him to boyscouts, [sic] you took him to little league, you even quit work for a while to help the family; isn't that correct?

A You say I quit?

Q Yeah, did you quit working for a while to help your wife?

A No, no, I quit my day job and because it was too much for her to handle the kids, so I quit my day job. I don't remember which job I quit, if I was on nights. Anyway, I kept my General Motors job and quit the second job.

I was back and forth working days back then, salary worked eight hour days a week, so I couldn't tell you what shift I was on.

Q My question would be: The reason you did it is to help bring up the household, to make sure everyone was brought up properly; correct?

[1053] A Correct.

Q You didn't have any problem with the other nine kids, did you?

A Gary was a problem. Denny and Gary were always getting into something. They were both –

Q They were the closest; it that correct?

A There was three boys together, and what it seemed like, what one didn't think up, the other one did, and they'd get into mischief, and then usually, Denny got the beating for maybe what the other two should have got.

Q Now, in fact you have indicated to the ladies and gentlemen of this jury that you tried to get him help; isn't that correct? You thought he needed help?

A Correct.

Q And you went so far as to get him help; isn't that correct?

A Correct.

Q And in fact, he didn't want help, did he?

A No.

Q In fact, he left and came back and said the people that needed help was you; isn't that correct?

A Yes.

[1054] Q And in fact, he became angry at that time, did he not, and very mad that you had even tried to get help for him; isn't that correct.

A Yes.

Q Now, are you aware back in 1979 – and you told about an incident that somebody had told you about, Mr. Sochor, about he got in a fight with the police and got arrested for assault and battery and resisting a police officer. Were you aware that he was put on probation back then?

A I don't remember. I might have at the time, but I don't remember now.

Q Well, he was put on probation for like two years, and part of it was to receive treatment, and right shortly after that is when he took off and changed his name and came down to Florida. Were you aware of that?

A No.

Q Let me show you, and YOUR HONOR, I ask this to be introduced in evidence, State's Exhibit F.

THE COURT: Any objection?

MR. RICH: No objection.

THE COURT: Maybe received.

THE CLERK: State's Four.

Q (By Mr. Hancock) And looking at, sir, if [1055] you would, please, State's Exhibit Four. This is a order indicating that he was ordered – and this is his name; right, Dennis Michael Sochor, and this address, do you know where that was?

A No, I never heard of it.

Q And here he was placed on probation for twenty-four months; right?

A Yes.

Q It indicates that part of the term of probation was rehabilitation, so he was supposed to receive treatment; isn't that correct?

A That's the first I know about it.

Q But do you know if he ever even tried to get any treatment, when he was ordered by the courts?

A No, I don't. I believe this instance, where I read in here where he was picked up and taken someplace, I believe they released him then and told him to come back once a week. I don't know if he was ordered to, but he was told to come back once a week, and then he took off.

Q Down here? You mean down to Florida?

A I don't know where he went because it was several years. I never heard from him. We thought he was dead.

Q So, the system tried to help him them; is [1056] that correct?

A No. I took it that they completely dropped the ball, didn't even care. That's the way I took it.

Q You weren't aware that he was on probation for rape down here?

A No, I didn't hear about that, until this instance. The California authorities told me about it.

Q I'm sorry, the California –

A About five years, the California authorities came up and talked to us, or somebody might have –

Q So, he was living in California a while, wasn't he?

A I'm sorry, I get California and Florida mixed up. What did you say? What state did you say?

Q I said he lived in California for a while. Were you aware of that?

A Only that when he came and said he was joining the Army, that's where I sent his birth certificate. How long he had been there, I don't know. If he just got there or what, I don't know.

Q When he was in California; right?

A Yes.

Q Do you know if he got in any trouble, [1057] while he was in California?

A None that I know of.

Q But your only contact you had with him then was that one telephone call?

A Yes, saying he was in California.

Q You weren't aware he got in any trouble in Florida; isn't that correct, until after the police came up and talked to you, after this homicide; is that correct?

A Correct.

Q Now, it even got to the point one New Year's Eve, as you've said, where he smacked you in the face?

A Yes, sir.

Q Just totally lost it; isn't that correct?

A Yes.

Q Became in a total rage; right?

A Insane, I would call it.

Q And in fact, he beat you up, and you lost approximately about a pint of blood; isn't that correct?

A Yes.

Q And then it got to the point where he would beat up on your wife; isn't that correct?

A I don't know if you'd call it beating on. [1058] Punching or hitting or something, not beat. I mean he never marked her or hit her in any way. It was something that you wouldn't do to your mother, and as much as I thought of her, I knew that it had to be a mental problem.

Q How old was he?

A This is when he got out of the Army.

Q Didn't you try to get him help before he went into the service?

A No.

Q This was after the service?

A No, I believe – I'm quite sure this was after he got out of the service.

Q When did he get out of the service?

A I don't remember. It's so long ago. I couldn't remember.

Q He was married, while he was in the service, was he not?

A Correct.

Q Did you know Patricia Neal?

A Well, not very well, but I knew her.

Q Did you know he used to beat her up?

A I never heard that, until I spoke to her out here today.

Q In fact, you tried to get him help because [1059] you didn't want him to hurt anyone or kill anyone; is that correct?

A Correct.

Q You thought he was to the point where in fact he might hurt or even kill someone; isn't that correct?

A Yes.

Q And you said that he got involved in a burglary; is that correct, of a doctor's office, a Dr. Anderson, did you say?

A Him and a friend broke into a doctor's office and took some diet pills, I think they were, and that was the first time that I remember of him getting into trouble.

Q Now, he would know it's wrong to kill, would he not? I mean you would have taught him that, would you not?

A Oh, yes.

Q And that it would be wrong to rape a young girl, you would have taught him that; is that correct?

A Correct.

Q And he would know it's wrong to do that; isn't that correct?

A Yes.

Q In fact, there came a time where Gary [1060] tried to tell you what had happened down here, didn't he, when he was down here?

A Yes, when he came home.

Q And said he was there, and he telling you what he had done to a young girl, and you didn't want to hear it; isn't that correct?

A Correct, it made me sick.

Q It was too difficult; isn't that right, to hear what the facts were what he had done to another human being?

A Correct.

Q Isn't that correct?

A Yes, I couldn't believe that anybody could hurt anybody like that.

MR. HANCOCK: Thank you. Thank you, Your Honor.

MR. RICH: Rose Sochor.

THE COURT: Let's take a break, for just a few minutes. Members of the jury, please go into the jury room.

Did you get those instructions complete?

MR. HANCOCK: We did, Your Honor.

THE COURT: Bring the jury in, please.

MR. RICH: Your Honor, we will call Mrs. Rose Sochor.

[1061] (Thereupon, the Defendant, further to maintain the issues on his part to be maintained, called as a witness ROSE SOCHOR, who, being first duly sworn, was examined and testified as follows:)

DIRECT EXAMINATION

BY MR. RICH:

Q Mrs. Sochor, you are Dennis' mother; right?

A Yes.

Q And I explained to you that you would have to testify in front of this jury, in regards to the penalty phase, and that this jury is to decide whether or not your son will live or die. Are you aware of that?

A Yes.

Q In response to my request, did you prepare a statement for this jury?

A Yes, I did.

Q Would you want to read the statement, or would you want to just tell us what you feel in your heart?

A I'd like to kind of glance at it.

Q You may read it, if you wish, Mr. [sic] Sochor.

MR. HANCOCH: We have no objection, Your Honor.

[1062] Q (By Mr. Rich) Would you please read the statement that you have prepared for this jury?

A Okay. Ladies and gentlemen of the jury, Your Honor, I come before you and plead for my son's life. If he did this horrible act, it is not all his fault, and he doesn't deserve to die. I feel what may have led to this started a long time ago.

Dennis is a good loving son and very family oriented. When he was a year and two days old, his brother was born. I came home from the hospital two days later. Having three babies to support, my husband went to work. At Dennis' bedtime, he was very fussy and crying. The new baby was crying also, and since his cries are more piercing, I picked him up and started to feed him.

Dennis looked at me and immediately threw his bottle across the room, never to take it again. The same night, he started sucking his thumb and did so for many years. This should have clued me, but I guess I was too busy to notice.

As the years went by, we had ten children. It was not only because I am Catholic, but also, I wanted to have a big family because I thought there is a lot of love in it.

Q Take you time, Mrs. Sochor.

[1063] A We worked very hard to keep somewhat on top of the bills. We had a home in the country with an acre garden. All of us raised the food, and I canned

thousands of quarts of fruits and vegetables for the winter. We had two cows that we had for milk for the children, and we raised a lot of our own meat.

Having ten children, while doing the cleaning the errands, I didn't have much time to really show my love for each individual child, even though it was there. I guess I thought they could feel it. As the children grew, we enrolled them in a Perokie (phonetic) school, hoping it would help to give them a good Christian Foundation.

When Dennis was old enough, I became a Cubscout [sic] leader for my sons, and my husband, when they got old enough, got involved in boyscouts. [sic] I also had a brownie troop, when my daughters were of age. We had a little league team for about six years. When my husband worked nights, I managed the team for him. I was on the Home School Association at our church, and I only want you to know that everything we did was for the children. I guess we thought by being really involved was helping show our love, but I know now all of this really shortchanged all the kids, Dennis especially.

[1064] He was a child that needed a lot of one on one, and there just wasn't time, and at the time, I didn't know all this. I though it would be easy to love my children and raise them. It has only been since the children are grown, and you have grandchildren that I see the wrongs I did with mine.

He wanted to get into music, with the accordian, and I took him for lessons to start, but we had to buy one, and just didn't have the money, and him knowing we didn't have the money, he didn't push it. I wished we'd somehow bought it. Dennis was a difficult child, but at that

time, there wasn't much written about it, as there is now, and there was not outside help, but I know now that when Dennis was naughty, it was because he was demanding attention, and I was on abusive mother because I wanted him to mind.

There were times I treated him horribly. I know it now. I didn't then. His high school years were also hard, as we only had one car that my husband drove to work, so when they went to dances or dates, they had to find a way there and home or walk, and that was seven miles one way.

As he became older, there was a lot of hostility and problems with him. We knew something was wrong, and we went to school to talk to Mother [1065] Superior. She looked into it, but she said there was no way we can afford professional help, and the sisters and us would all try to help him. My husband worked two jobs at the same time because we had a running dentist bill that was finally paid up by the 25th.

It became very bad after his discharge from the Army. Whenever he drank, he would become violent, and on the next day, he acted as if nothing had happened. When I told him what he had done, he thought I was exaggerating or telling him some lies. He had attacked my husband, his brothers, and me. He finally attacked one of nis brothers so bad that he was taken to jail.

We went to see about getting psychiatric help at that time because we thought we could afford a little bit anyway, as we told them that one day, he was going to go too far, but he never ever remembered doing any of it. They said there was nothing they could do because he

had to turn himself in for help, and he told us he didn't need help, that we did, and I sincerely believed this.

Somehow, we got to talk to a judge, while he was in jail, to see what we could do to get him committed for help. After listening to our pleas, he somehow believed us and got around all the rules to [1066] help us get Dennis committed to a place, Jarvis Acres (phonetic), where he stayed not even quite a week, when they called me and told me to come and pick him up.

At the meeting with the counselor, they told us that he definitely needed psychiatric help, but was not severe enough to keep him there. I guess it was the place. I don't remember, but I guess it was the place where they took people that were violent. He told them before we left that he would seek help, and they let him go.

We went once to set up an appointment for Dennis' dad and I. We were all going to go for help because I knew we all needed it. At the time we took him out, he said he would go, but when it came time to go, he said again, he didn't need the help, we did.

I was quite concerned about how he would feel about us putting him there, but he never held it against us at all. One time, my husband lost his job. I guess he didn't really lose it, but he was demoted, and we didn't know which way to turn. All of the security was gone, but Dennis went to work in a factory and gave his whole paycheck to my husband. My husband tried to give him some money for himself, but he would not take a penny. He only wanted a couple of packs of cigarettes a week. This went on for about a year. He [1067] never griped or complained never. He actually seemed happy to help.

My husband went back to work and thanked him sincerely for helping and said we no longer needed his money, now he would be able to keep it for himself, and I guess that was another mistake because Dennis needed to help. My son Dennis is a good and loving son. I don't know what triggers the violence when he drinks. If only someone would have helped us with him, when he needed it. If only I had been a better understanding mother. We tried the best we knew how. I love my children so much. I wasn't equipped mentally or physically to take care of that much.

The Lord alone, how he tries. I feel so much sorrow for the parents and loved ones of the girl and, the first time I heard, I wanted to do something about it, but I didn't know what to do, and I was hurting myself. I can't imagine the horror they have gone through and will the rest of their lives, but at the same time, I love my son. I have done so many things wrong to him. I beg you, don't take his life, please. Give him the help that any sick person deserves, the help that nobody else has been willing to give. That's it.

Q (By Mr. Rich) Now, Mrs. Sochor, this [1068] statement that you have given us, did I in anyway help you write it or compose it or dictate it?

A No.

Q And your husband's statement, did I in anyway help him write that?

A No.

Q They [sic] statements that both of you wrote on your own?

A Yes.

Q As a matter of fact, this is the first time I ever heard either statement?

A Yes.

Q Or your daughter's statement?

A Yes.

Q Was the first time here in Court?

A In fact, I just called my daughter last night and asked her to come down from –

Q And I never read these statements before?

A No.

Q So, what you are saying now is –

A From my heart.

Q Do you feel, Mrs. Sochor, that with God's help, your son can be saved?

A Yes, I do.

CROSS EXAMINATION

[1069] BY MR. HANCOCK:

Q Do you need a drink of water, ma'am, or anything?

A No, thank you.

Q I just have a couple of questions, with your permission. You indicated that you were a very close family; is that correct?

A Yes.

Q Even though you had ten children, you tried to give them all the love you could; isn't that true?

A Yes, I did.

Q And you tried to do the best that you could; isn't that correct?

A Yes, I did.

Q And parents make certain mistakes, and I think you indicated you made some mistakes; is that correct?

A I made a lot of them.

Q And he is the only one out of you children that had problems; is that correct, with the law?

A No, I am sure they all had problems, but it just seemed like I guess he was the nuttiest.

Q And it come to the point where he had [1070] quite a violent temper; is that correct?

A Yes.

Q In fact, he used to beat up on the other children; is that correct?

A Yes, but as I have said, I am sure it's from his childhood. I got beat, too.

Q And would he just get beat for no reason?

A No.

Q Your husband –

A He got beat for what he did.

Q And there was a lot of discipline in the family; is that correct? Your family, your upbringing, did you have a lot of discipline in your family like so many of us?

A No. I mean, I had a lot of discipline, but my dad was a wonderful person.

Q Your dad was; right?

A And I didn't have to get a spanking.

Q Now, did your husband ever just beat him for no reason?

A no. [sic]

Q Generally, there was a reason because he had done something, and your husband was attempting to discipline him; is that correct?

A But the punishment was too severe for as [1071] little as he was.

Q Now, did there come a time when you had problems with Dennis, and then when your husband would come home, you would tell your husband?

A Yes.

Q That he pushed you around and –

A Yes. That was another thing, I never did anything myself. I always threatened the kids, when their dad come home. I never followed through.

Q And in fact, he got to the point where he was pushing you around; is that correct?

A Not just when something happened. I don't know if it had been when he was drinking.

Q Well, isn't it true that there was a lot of fights, even before he was ever of drinking age; isn't that correct, that you saw a change in him?

A I can't remember when it was. Kids drink young.

Q But it came to the point where you figured he needed some help; isn't that correct?

A Yes.

Q You thought he was to the point where he might hurt someone and might even kill someone; isn't that correct?

A Yes.

[1072] Q Did he appear to be more violent toward men or girls?

A Men, because it was his brothers and his dad, and it was only when he was disciplined, or it's been so long. I don't know why he fought with his brothers. Brothers fight, when they are little. They used to always fight.

Q Now, how about your husband, it got to the point where one New Year's Eve, he knocked your husband down; is that correct?

A He had been drinking.

Q And hit him as hard as he could, would that be a fair statement?

A I guess.

Q And it came to the point where he was – in fact, you even let him live in the house until he was like twenty years old; isn't that correct?

A Yes.

Q Because you tried to do all you could to help him; is that right?

A I can't remember how old he was.

Q It appears that you blame yourself; is that correct, for some of the things that he may have done, or things he did do; is that correct?

A I was a very abusive mother.

[1073] Q But your husband used to try to help him too; is that right? He'd take him to Boyscouts. You'd take him to Little League.

A Yes, we loved our children. Even though w had ten, we loved them.

Q And I am sure you did. I don't think there is any question you gave him as much love as you could, as much love as you had for the time; is that correct?

A Yes.

Q Now, were you aware that he was ordered to receive certain treatment and help?

A He wasn't ordered, that's the problem.

Q Where you tried to get it, and then they took him in, and he came back, and he was upset that you people even tried to send him to a hospital.

A No, he wasn't upset.

Q He wasn't mad?

A He wasn't upset.

Q He didn't say, "You people need the help, not me?"

A It's when I asked him, I says, "Dennis, if you go for help, I will go because I know I need it too," and that's when he said that he didn't need it, we did, I did, or I don't remember who, him or his dad [1074] and I or him.

Q Now, let me show you what's marked in evidence, and you may have never seen this before, so just tell me if haven't. It's State's Exhibit Four, ma'am, in evidence, and it indicates that he was put on probation in 1979, and part of that was because he was in a fight, assault and battery on a police officer, resisting a police officer. Were you aware of any of that incident?

A I didn't know where that happened.

Q Let me show you, and it says right here Ortinville (phonetic). Have you ever heard of that?

A No.

Q Is that in Michigan?

A I have no idea. It says Michigan, does it?

Q Right. Do you know how many different names he was using?

A No.

Q Let me ask you this: If he was put on probation in 1979, in Michigan, for two years, do you know if he even stayed to receive any treatment or help in Michigan?

A Seventy-nine? I just can't even – I just don't know.

[1075] Q That's all right. In 1980 though, were you aware that he was arrested and convicted for rape down in Fort Lauderdale?

A No, not then.

Q Were you aware that he was very violent to his first wife, Patricia Neal?

A No, I was not aware. Pat never told us.

Q There was a lot of things about him that you were not aware of, would that be a fair statement?

A Yes, there were. I know there were things about the marriage that Denny wasn't happy about, too.

Q You weren't aware of any problems he had with prostitutes or whores, while he was living in Italy then; is that correct?

A No.

MR. HANCOCK: That's all. Thank you, ma'am. Thank you, Your Honor.

MR. RICH: Thank you, Rose. That's all I have, Your Honor.

THE COURT: State wish to make some comments?

MR. HANCOCK: Yes, thank you, Your Honor. Mr. Rich, Judge Seay, and ladies and gentlemen of the jury, again, I thank you for participating as jurors. I will not thank you [1076] for your verdict because you took the law, you applied it to the facts and came back with a verdict that spoke the truth, and you did it after hearing

all the evidence, and so on behalf of the State, I thank you for you participating as jurors, and you did your duty, and you did it with courage. You did it with truthfulness.

The Court is now going to give you some circumstances to consider. The Court is going to tell you about certain aggravating circumstances and also some mitigating circumstances. The Court is going to tell you that the first job is to consider the aggravating circumstances and see if they apply, and if you find that certain aggravating circumstances apply, then you must consider. If there is mitigating circumstances, then you must make a determination, if the aggravating circumstances outweigh the mitigating circumstances, and then you make a recommendation, and it's a very important – your recommendation to this Court is extremely important, and there are many reasons for capital punishment, and we do have capital punishment in Florida as a deterrent in [1077] retribution, and I think retribution is a justifiable function of our society, and it's not a matter of revenge at all.

It's a matter of justice, and capital punishment, is the ultimate symbol of law and order, and that's very simple. If you commit the worst crime, then you must suffer the worst punishment. It's that's [sic] simple, and I think you people all said that the punishment should fit the crime, and it's not pleasant to be here. It really isn't.

I'm sure Mr. Rich agrees with that, and capital punishment is not pleasant, and we do have capital punishment, and it's the state government. We send young people into wars and battles, knowing that they are going to lose their lives, and it's the same thing with capital punishment.

If you do a certain type of crime that's heinous and atrocious and against the State and against the government, then rightfully you should be executed, but your job is to consider all the circumstances, and in this past week, we heard a lot of tears in the courtroom, and in this sentencing phase, and as I said before, [1078] whatever tears are shed, are much easier to shed than the blood of Patricia Gifford, much easier, but we all remember the little girl, just recently last week, little Jessica McClure, I believe her name was, the little eighteen month old girl that fell down the little tunnel, the little well.

She was down there – I think she was down there like forty or fifty-eight hours. She was down there without any food. She was down there without any water at all, and I am sure everyone felt for her. There were prayers for her, and no one knows what that little girl went through, but fortunately, she was rescued, and she was saved, and she suffered a life and death situation, and fortunately for her family and everyone else's, her life was saved, and what we have here, we have also a life and death situation.

We have a life and death situation that occurred back on January 1st, 1982. Patricia had the similar experience, and we can't go back there, and I can't take you back there to that evening, to the pain and the horror that she suffered that evening. We can't go back there, [1079] and you cannot experience that, but you have to base your decision on the facts and the law.

So, I am going to go over those, and I ask you, when you make your recommendation, to come back with what you think is the proper recommendation, and I will later

tell you what I think the proper recommendation is, based on the law and the facts, and it's not an emotional decision. It is a legal decision that you make, no matter how many tears are shed.

Your job is to apply the law and what aggravating circumstances apply to the facts of the case, and it's a legal decision, not an emotional decision, and there is a lot of ladies on this jury, and ladies have more of a tendency to become emotional, and there is nothing wrong with that, but it is a legal decision that you have to make today, and some of the aggravating circumstances that you can consider is that the defendant was previously convicted of a capital felony, or a felony involving the cause or threat of violence to another person, and there is no question that that aggravating circumstance applies.

In fact, even though this is just a piece [1080] of paper, and even though it says he was convicted of sexual battery, there was a victim, and that victim was Rhonda Rowe, and you heard what happened to that victim. You heard that in fact he took her, and you heard the violence that he did on her, and how he bit her here and here, and that even during her statement, she regurgitated. She threw up. It was that much violence. It was that much pain and suffering that she suffered, and he terrorized her, and he was convicted, and you will see that he was convicted in September of 1980, and approximately a year after that, shortly after a year, he was released, and he is doing it again. He is doing it again.

And I guess this goes to show you how the criminal justice system doesn't always work, that in fact it didn't

work at all, but there is no question that that one applies, that aggravating circumstance applies. He has been previously convicted of a rape.

The crime for which the defendant to be sentenced was committed while engaged in the commission or attempt to commit any sexual battery or kidnapping, and again, there is no [1081] question, ladies and gentlemen, that that one applies because, in fact, he even says in his statement that he wanted sex. She refused him, and that then he went and started – they got in a fight. He had this urge to have sex. Whatever sick urge this is, he had it, and that's a sexual battery. You also convicted him of kidnapping, and you can't combine the two, but you can put them together, and there is no question that one applies. That's the second aggravating circumstance.

The other one, and it's an extremely important one, and that is that the capital felony was especially heinous, atrocious, or cruel, and I think there is no question, whatsoever, that this crime was ruthless, was senseless, was atrocious, and even was a heartless murder, and the evidence is clear that he dragged her out, dragged her out of there, while she was screaming for help, and she begged for her life, and he takes her back there, and then he kills her, and he chokes her, and you heard from Dr. Wright. Dr. Wright told you about the pain that's involved, that it's not a quick death, and that she had to contemplate [1082] her own death, that she was out there on that abandoned road at night, that she had that fear that she knew what was happening, as he was choking her, and there is no question from the evidence that she was innocent, that she was an innocent eighteen year old girl that was very beautiful, very sweet. She had a lot of

promises, and he took away her most precious right, and that was her right to live, and there is no question that this crime that he committed on Patty was atrocious and cruel, and that's the third aggravating circumstance.

Another one that you can consider is that the capital felony was homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification, and I think that one applies, too, and that applies because, in fact, he takes her out – if he wanted just to have sex, he could have had sex in the pick-up. He took her out, and then he killed her, and there was no legal or no justifiable reason at all for Patty to lose her life.

In fact, you heard from the evidence he was on probation for rape, under the name of [1083] Dennis Grant, but he knows what happened. He didn't kill that girl. He knows that, in fact, he was put on probation, and he knows if, in fact, he was caught again, then he is going to be violated. So, I think that that one applies, that it was in a cold, calculated, and premeditated manner. I don't think there is any question that that one applies.

Then we come to the mitigating circumstances in this case, and I'm sure Mr. Rich will get up here and argue that they apply and just like he argued, in fact, that that [sic] he was not guilty of this crime, and he is expected to do this. He was excellent, and you will hear him get up, and I am not quite the speaker he is, and I ask you to listen to him like you are listening to me, but the question is which mitigating circumstances and go over there and read them to yourselves.

One is Dennis Sochor has no significant history of prior criminal activity. Ladies and gentlemen, that doesn't apply at all, and that's why we called Captain Schlein, to testify about the pending sexual battery case he still has in Michigan, and you heard about that one, how he [1084] takes her from the bar. In fact, she even throws up in the car, when he is taking her back, so there is no question. You heard about these from the other family members, about the battery on the police officer. You heard about the burglary from the doctor's office. There is no question that that one doesn't apply.

He is on probation for rape. He has a definite significant history of criminal activity.

Here's another: The crime for which the defendant is to be sentenced was committed while under extreme or emotional disturbance. That doesn't apply either, and take the doctors' reports back, and you will see and read them in a little more depth. The doctors testified. You seen what they found him to be, a sexual offender.

In fact, Dr. Zager's report indicates that in fact he was involved in like three different sexual batteries, but they all concluded the same thing, that he knew it was wrong to kill, and I even think his mother and his father indicated that, that he would know it's wrong to kill, and so I don't think that one applies at [1085] all.

And the doctor said he even tried to fool them. You remember Livingston said about the fake profile. He was trying to fool the doctors, and one doctor said he had selective amnesia.

I think all murders that occur, there is something wrong, there is some psychological problem, or he wouldn't kill, but that doesn't mean your emotional to the state you don't know what's going on, and that you're so disturbed you don't know it's wrong to kill, and it's wrong to rape.

Many people have emotional problems and disturbances, and they don't go out and rape and murder.

Another one is that the defendant's capacity to appreciate his conduct and conform to the law was substantially impaired, as the doctor's [sic] told you. That one doesn't apply either. They can't get up here and say it's alcohol, that the reason he committed these violent crimes was because of alcohol, because you heard from Patricia Neal, and Patricia Neal was married to him for about a year, and she [1086] told you about the beatings that she suffered, and she said that he wasn't under the influence of alcohol then, that he didn't even drink alcohol, so they can't come up and say that that applies in mitigation because when he drank alcohol, he became violent because he became violent, when he didn't drink alcohol.

And then another one, and I don't think any of those are mitigating, and there is another one: Any other aspect of the defendant's character or record and any other circumstance of the offense that you can consider, and I think it's extremely nice that the family came down here and testified, and no matter what they have to say and the tears they shed, I think they are a loving family, and I think they tried to do all they could for Dennis Sochor, and I think that the mother tried that. I think the dad

tried that, and it's funny that they always want to blame it on someone else, and you always want to blame it on yourself, when something goes wrong. The mother, she blames it on herself.

They claim he was beaten, he was disciplined, and so he was abused when he was [1087] young. I guess they want to claim that that is a mitigating circumstance in this case.

Well, there are many people that are abused and children that are abused, but that doesn't give them the legal right to go out and rape and kill people. It really doesn't, and it's so easy to identify with the living. It's so easy to come in here and identify with Dennis Sochor's family. That's very easy because you see, they are alive, and it's so much easier, but as I said, don't forget what happened to Patty and don't forget the pain that she suffered, and they get up here, and they say they understand how her family – if you recall – they understand how her family feels.

They can't understand how her family feels. She was only eighteen years old. She had her whole life ahead of her. She was eighteen. She was very beautiful, and there is a difference between when you kill someone young, and when you kill someone old. Someone old, they have already had their life mostly. See, someone young, all they have is their hopes and their dreams ahead of them, and he took that away from Patty.

[1088] Mr. Sochor, he seems like a decent man, when he testified. He said he tried to raise him, took him to Little League games. They took him to church, and he said he couldn't believe – you remember him, he said he

could not believe that someone could do that to another human being. When Gary started telling him what had happened, he couldn't believe it, and you can take all the stuff back with you.

They tried to get him help. The parents even tried to get him help, and it's indicated on the record that, in fact, he received probation in Michigan, and part of that probation was that he receive treatment, and what does he do, he doesn't voluntarily go get that treatment. He takes off, and that's when he starts changing his name. He was on the run. He takes off.

Shortly after that, you hear that he commits this rape in Michigan, and then he comes down to Florida and changes his name, then he commits a rape down in Florida, so then he has to change his name again, and then he goes to these other states.

So go back there and come back with a [1089] decision that you think is proper in this case. I don't think there is any question that the aggravating circumstances outweigh the mitigating circumstances. There is just no way they are going to get around that and get up here and argue that they don't, because the aggravating circumstances, there are at least four, and I don't think there is any mitigating circumstance, unless you include the tears of the family, and you have to consider – and I could get up here and tell you, you know, not to consider these, but I think you have to consider all of them, but you got to consider something else. You have to consider what he did to Patty, and how it happened.

You have got to consider that in making a determination of what the proper recommendation is, and if you

live by the sword, you must die by the sword, and he had no mercy on Patty, and Patty wasn't involved in any child abuse when she was younger or anything like that, and a lot of times, it's very hard to get up here and give a recommendation, and I am not a big fan of capital punishment. I am not a big proponent of capital punishment. I think it applies just in [1090] certain select cases, and only in those select cases, and the State's recommendation in this case is death because you have to decide if this is a type of crime that deserves the worst type of punishment, and I don't think there is any question that this is one of those atrocious, most cruel, one of the most senseless, one of the most heartless crimes that there can be, and if you take all that in, you see that the aggravating circumstances definitely outweigh the mitigating circumstances, and remember, you can consider the other testimony that you have heard in this case, and remember Paul Jones, what Paul Jones said, what he said about that it's easy, and if you remember this, he said it was easy to kill, and he said that life is life, and death is death, and when you're gone, you're gone.

It was easy for Dennis Sochor to do what he did, and that's what he said, and in fact, even Hickey said that he called her a slut, a bitch, Patty, this eighteen year old girl, this is the way he described her. He gave her no mitigation, whatsoever.

So, go back there and do your duty, like [1091] you did before, and you have an opportunity to do something. You have na [sic] opportunity to come back with what you think is the proper recommendation and not only an opportunity, you have a duty to do that, and you have an opportunity to bring justice to a sometimes very

unjust society, and so go back there and come back, and tell Dennis Sochor that he had no value for life. In fact, he said life is life, and death is death, when it's gone, it's gone.

It's easy, he said, and he could do it again. So, go back there and tell him that his life, that the crime that he committed against not only Patty, but against the State of Florida, that he deserves only one sentence, and your recommendation should be twelve to zero is what is should be, if you take the law and apply it to the facts, and don't be emotional about it, and remember the tears of the family because he has forfeited his right to live in a humane society by what he did.

So, go back there and listen to everything and listen to Mr. Rich, and decide if this is the type of case that we have capital punishment in Florida for, and it is, and the reason we [1092] have capital punishment in the State of Florida sits right there, and that's Dennis Sochor.

Thank you. Thank you, Judge.

MR. RICH: May it please the Court, Kelly, ladies and gentlemen of the jury. This is a v[illegible]agic moment for all of us, I suppose. Somehow I supp[illegible]s a compliment when Kelly says that he is not as good a speaker as me. Kelly is our top gun in the State Attorney's Office, and this isn't the first time that we have tried cases together.

When he says he is not a fan of capital punishment, I have never tried a case with Kelly where he didn't ask for capital punishment, and I have never tried a case where I

never asked the jury not to bring back capital punishment. I am opposed to capital punishment, and that's why I always get talked into by judges to take cases like this because I am viamently [sic] opposed to capital punishment. I don't think anyone has a right to take the life of anyone. I think only God has a right to give and take life.

So, I have, throughout the course of my career, more times than I care to count, have pleaded with juries to spare my client's life.

[1093] When I was a young lad, I have seen the face of death in the service of my country, and it's a frightening thing. I spent many hours in fox holes,and whoever said there is no Atheist in fox holes was right. It's a frightening thing to have to face the reality of death, when you're young, knowing that you have your dreams and your hopes ahead of you, but I have got over that, and I don't regret the service that I gave to my country.

If it wasn't for that, I would never be a lawyer because they sent me to law school to be a lawyer, try a lot of cases, and I wound up not too long ago facing death very, very closely because I had a very, very severe heart attack, triple bypass. It was so bad, that they were making funeral arrangements for me. My wife is here. She remembers that tragic moment, and when the doctor came in to me, and he says, "Charles, we have to perform this catheter, whatever it was." I says, "Well, why do you have to perform that." He says, "If we don't do it, you are going to die," and I says, "Well, what happens if we do it." He says, "Well, there is only a fifty/fifty chance that you are [1094] going to die," and you know, when I was a

young lad, it was terrifying, but when I became an old man, and I was faced with death, it wasn't so terrifying because I know that when I finally go to meet the final judge, and he says to me, "Charles, what have you done on earth that entitles you to eternal rest and peace in heaven," and I can say, "Well, Judge Lord, all I ever did for a third of a century was to plead for the life of my fellow man, and I don't know if I was wrong because Kelly always pleaded for death. God, was I right, or was I wrong, or was Kelly right, or was Kelly wrong?"

He says, "Well, I will talk to Kelly later. I am talking to you now, and you did the right thing, when you pled for the life of your fellow man and for the life of the man that I made and created."

So, you can talk about all the mitigating circumstances you want, and you can take a scale back there, and you can weigh one against the other, and you can say there is three mitigating circumstances, and there is three aggravating circumstances, and you can say whatever you want on the scales of justice, which I proudly wear [1095] on my belt, but there is no justification for death at the hands of the State of Florida.

When I spoke to you in closing arguments, I talked to you about Karma, and of course, I'm a firm believer in Karma, firm believer in destiny. I know that when I was born on October 9th, 1925, that I was destined to talk to you twelve people. There is nothing in life that would have changed that.

Here is a case – and believe me, I am no virgin to capital crimes. This is not my first case. I am not a young novice law student that has never faced death trials

before, and this is the worst I have ever had to go through. This is the worst I have had to go through because of the circumstances of a poor – and I know it's not an excuse for the crime, but a poor unfortunate individual who never had a chance, from a very young age, and who's Karma was destiny because of his environment, because of his abuse, because of the things that molded his destiny, while he was a child, led him to this courtroom today.

Let's look at them. You heard the aggravating circumstances. You will get these [1096] back there. I don't have to argue these to you. He said something like circumstances of the past. Well, what really amazes me about the judicial system, about this entire system of society, we could spend, I don't know, what, a billion dollars on a submarine, or twelve million dollars on an F-16 or an F-15, who can destroy a city in a second, but do you think we would ever spend enough money to feed the poor, to feed the hungry, to feed the needy, to feed the mentally deficient?

I was amazed when I read Zager's report, and you will have it here. "This man is extremely dangerous, under the influence of an alcoholic beverage. He has a drug abuse from the time he was sixteen-and-a-half, but he is not dangerous enough to be involuntarily committed, under the Baker Act." What kind of stupid law is this? What kind of system do we have in this country? What kind of society do we have in this country that doesn't take care – we have created a frankenstein monster with this system.

And then we wonder why we have people, ninety percent of the people in this country, [1097] who are in favor of capital punishment. If he had received the treatment, not voluntary commitment, but an involuntary commitment, at the time when he was first diagnosed, this would have never occurred. Society, you people, me, everyone is to blame for this situation that we have here today.

So now that Kelly, the top gun, comes in here and says, "Well, destroy this sick person". Well, you want to really be right about it. We have got about three hundred and fifty-four hundred thousand men who are incarcerated in jail, throughout this country. I have the perfect solution for the crime of America. Let's kill them all. Let's take all four hundred thousand of them and wipe them out. You will have four hundred thousand who will never comit [sic] a crime again. How's that for a solution?

I think Hitler tried that. Somewhere, somehow, I have got to get twelve people, or seven people even, to understand that death only begets death. Killing him is a total act of revenge by the State.

The philosophy of Mr. Kelly: "If you live by the sword, you die by the sword," and that's [1098] the problem with our world today, billions and billions and billions of dollars for defense and destructive weapons, but not one dollar to save this man from committing the crime that he did commit, and I wonder if he was alone in committing it.

There was other people there, too, another person there, too, who says – and I don't, you know, quarrel with the jury verdicts. I am never one to quarrel with jury

verdicts. You people are here, and I know it's not pleasant, and I know when you said you would like to serve on this jury, you didn't know what you were getting into, and everyone of you said, "Yeah, I'd like to serve. Oh, yeah, I believe in capital punishment," but now you are faced with a harsh reality of pulling the switch, and don't think that your advisory opinion is going to go ignored by this Court. Judge Seay respects – and I guarantee – well, I can't guarantee you you [sic]. It's not binding, of course, but I will guarantee you one thing. He respects and admires every one of you, and he will take into great consideration your recommendation.

I doubt, knowing Judge Seay for thirty [1099] years, that he would take lightly – I know he wouldn't take lightly, no judge in this circuit – no judge that I know, no judge that I have ever tried a case with, would ever take with a blithe spirit your recommendation.

I will just look at them. I will go through the drill, as to mitigating circumstances. The crime for which the defendant is to be sentenced was committed while he was under an extreme mental or emotional disturbance. Boy, if that one mitigating factor does not outweigh all the aggravating circumstances that Mr. Kelly can tell you, and I know Mr. Kelly is trying to dig at your moral fortitude in saying you have to kill because that's the only punishment that fits the crime, but can you honestly in your heart say that this defendant doesn't have some kind of problems mentally? Is he really responsible for what molded his Karma and his destiny, or was the outside forces in which he was raised, his environment, was that responsible for the final production that we see here?

Now, that was beyond and above his control. Certainly that one factor alone would [1100] outweigh any of the aggravating circumstances.

The capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. Any question in your mind about that? You got the reports here, the whole thing. Some of it came out. Some of it didn't. Now, you got it all.

Zager, nevertheless, "Behaviorly, he loses control under the influence of alcohol. Can be overtly dangerous to others, if given the opportunity. This gentleman can be extremely dangerous, under the influence of alcohol." This was diagnosed twenty years ago, fifteen years ago, and then when I ask Dr. Zager, a competent psychiatrist, he said, "Well, he's extremely dangerous, but it's okay to leave him out." What kind of a law is this? "He is not a candidate for involuntarily [sic] committment, [sic] under the Baker Act."

Patsy Ceros-Livingston went through a lot of psychological tests, where you check things out. I have gone through that thing, too. I flunked it, too. According to her, I am a psycho myself. She's probably right. She says [1101] that he knew the difference between right and wrong. I am not trying to tell you he didn't know the difference between right or wrong, but she says, "If committed as alleged, however, it should be noted that Mr. Sochor reported he had been drinking, was drunk at the time of alleged crime." Well, it goes to the mitigating circumstances. What, do you think he was at that bar five, six, seven hours and didn't have a drink?

Then she says, "Well, when he was in Italy, he didn't drink, but he was on hash in Italy," an even worst [sic] drug. Hashish is worse than alcohol, and I know that his ex-wife didn't want to come in here and testify. She was subpoenaed to be here. She didn't voluntarily come down here and talk about this, but even back in the service, they went to a psychiatrist, and so well, "He is dangerous, under the drugs and hashish, and his conduct doesn't conform, but he is not a candidate for involuntary – even in the service, no one seemed to want to – you know, years ago back when McNaughton – you heard of McNaughton's Rule – McNaughton was a poor diluded individual [1102] who had dillusions and said, "Well, God made me kill some member of parliament." McNaughton's Rule stems from 1892, and they are still using McNaughton's Rule in this modern age now.

I would certainly have hated to have a triple by-pass using the procedures that they had back in McNaughton's time.

The psychiatric evaluation of another doctor, Castillo. He says that – you can read these, you know. He says he has an anti-social personality and a mixed substance abuse, alcohol, cocaine. Now, these aren't my doctors. These are the doctors that are paid by the State.

I'm sure if I could have afforded it, I could have gotten another psychiatrist and could have gotten you a different evaluation, but unfortunately, nobody can afford these things. I always question the money, too much money for jails, jails are overcrowded. We need more jails. We need more judges. We need more prosecutors.

Well, it's always a numbers game. It's been that way since I was a young lad like Kelly.

So, they decide to – we can't take care [1103] of it, so let's kill, let's destroy it. Like the American who is sick with AIDS. Well, we can't cure it, so let's kill them. A person who's sick with Cancer, well, we can't cure it, let's kill them, but sick is sick, whether you're physically sick or mentally sick. They don't kill people with AIDS. They don't kill people with Cancer. They research. They give them medical help. They give them treatment.

When it comes to a sick mind, they don't treat it. They just let it go in our society. We have running around, time bombs waiting to explode. We have people out there who are sick, and nobody, you, me, or nobody else, the Courts, the system, nobody wants to pay to take care of sick minds, so we kill them. That's the easiest way to do it.

So, if you want to have that type of philosophy, let's kill the lawyers. The lawyers only come in here and just aggravate everybody and just impede the progress of justice. Just go ahead, when they're caught, just have cops take them out in the alley and shoot them. That would be a great deterrent, wouldn't it?

And I suppose some cops would say, "Yeah, [1104] that's a good idea. Let's do it that way," but we don't do things like that in America. We might don't [sic] things like that in Natzi [sic], Germany. We might do things like that in Iran. You don't do it here in America, but we do have the barbaric and the cruel an [sic] inhumane punishment, the electric chair, and I think every juror, whoever voted for the death penalty, should have to witness an

execution in the electric chair. I have, on numerous occasions. It's a horrible, inhumane way of killing.

I am uphauled [sic] at this nation, the greatest nation on Earth, should have such a law. They do. Many states have it, and many states don't. The Federal Government doesn't have the death penalty, but Florida does, and Florida always asks for it, and it never deters one crime of passion. It doesn't even deter crime when there is no passion. It doesn't deter killer for hirer [sic]. It hasn't deterred one homicide from happening. All it does is bury the problem. So, what's the alternative? You recommend mercy, and you recommend life, and he will spend twenty-five years in the can, and that's day for day.

[1105] Maybe he will receive the help that he needs. Maybe he will receive a divine guidance, the mother's prayer of redemption. He tried it. It succeeded for a while, when he was in the religious efforts, that he tried. He made a feesible [sic] effort to it, but he wasn't required. It wasn't compulsory. It was something that he knew he had a problem with, and that he tried to do, and he was led into temptation, and no one is a saint.

Instead of saying to the devil, "Get thee behind me," he let it take over him, and now it's up to you people here, twelve strangers, people who I've never seen before, who I probably will never see again, to pull the switch on a poor diluded man, who obviously has no control under the influence of an alcoholic beverage.

So, I know that in some future time, when I'm sitting in my backyard by the pool, and I'm drinking my scotch and water, and I'm contemplating the decision that I made today, and the plea that I made to you, I know that

I have done the right thing. I know that my conscience will be clear. I know that when I [1106] meet my maker, and he says, "Charles, what have you done," I know that he's not going to condemn me for asking you for mercy, for asking you to put this man in a place where he will spend the rest of his life, and maybe, occasionally somewhere along the line, a shrink will look at him, and a shrink will help him, and after twenty-five years, he will finally come out and be redeemed by divine providence.

UNIDENTIFIED SPEAKER: Never.

MR. RICH: Say it again.

THE COURT: Okay, let's go on. Quiet here.

MR. RICH: I don't need that.

THE COURT: But let's go on.

MR. RICH: That was the brother of the deceased who said that. That's why we don't have brothers of decedents on juries. He would have you pulling the switch, and I am sure that he would be glad to pull the switch, but he is not a juror. He is not the one that's going to make this decision. It's you, and I don't know when you go back to your homes and back to your lives, back to your everyday experiences, and if you might in some quiet time in your life think [1107] back on this day and say, "Did I do the right thing," because once you make your decision, once the decision is made, you cannot retract it. It's in stone, and you must live with that decision for the rest of your life, and I hope it maybe [sic] long.

I know not, and I ask not, and I tell you not what decision that you should make. As I have said to you

before, you have to be a Daniel to come to judgment. You have to use the wisdom of Solomon, and you have to have the patience of Joan.

I don't envy your position at this point. I would not want to trade places with you ever.

I would never want to be placed in a position wherein my hands I held the life or death of another human being, but that is your job, and that is your duty, and you accepted that, and you accepted it with a lot of courage and a lot of moral fortitude, and I don't belittle it. I understand that it's a great sacrifice on each individual's part, and it's probably most likely the greatest decision that you will ever have to make in your whole life.

I had to make that decision when I had my [1108] triple by-pass to live or die, and back when I had this thing six years ago, it wasn't as easy a procedure as it is now, but I made that decision to live, and with God's grace, I am still alive today. So, for those of you who have never faced death, take it from me who has faced death, it ain't a pretty sight, and I think that this is something that really is the fault of all of us.

When I say is all of us, I mean society, because it is not only Dennis Sochor. I have pled this same thing before. There has been others. I think that there are many other people – you know, it's a world gone crazy. The Legislature says now you can carry guns to protect yourself because the police have admitted, or the Legislature has conceded, I suppose, that they want protection. You have to wait for disaster to happen, before you can do anything. You have to wait for somebody.

It's like you make a complaint that my mate had threatened to kill me, and the cop says, "Well, I can't do anything, until he kills you," and that's what's happening throughout the criminal justice system.

[1109] So, as I leave you with the most important decision that you will ever probably have to make in your life, and I plead with you to make the right one. I plead for my client's life. I am not making a lot of money on this case. It's not a question that what I'm doing is for the bucks.

Kelly is making more money on this case than I am. It's not a question of money. I have been appointed to represent this man. So, I am not pleading with you and talking with you because I am taking a big fee out of this like Matlock would, a hundred thousand dollar fee. I would probably talk a little bit louder, if I was going to make a hundred thousand dollar fee, but I am talking through my heart that this man, and no other man, deserves to die.

"Revenge is mine," says the Lord. It's up to the Lord to take a life or to give a life, not you or me or anyone else or the State of Florida, and I ask you to spare his life.

Now, if someone came to me at my age and says, "Charlie, what do you want to do, die in the electric chair or spend twenty-five years in the can." I'd have to say, "Give me the quick [1110] plan." I'd rather do the electric chair because I've made peace with my maker. I am not afraid to meet him and tell him what my life for the last third of a century has been like, and the Lord will talk to Kelly later.

MR. HANCOCK: I object to that. I don't think that's appropriate.

MR. RICH: So what, I didn't object to anything you said.

THE COURT: That's improper.

MR. HANCOCK: That's not proper.

MR. RICH: I think it's perfectly proper. This top gun here always asks for the death penalty.

MR. HANCOCK: Judge, that's not true. Mr. Rich knows that. I ask for a sidebar, Your Honor.

THE COURT: Gentlemen, let's just keep this off a personal level and speak to the jury.

MR. RICH: It's the policy of his office to always ask for death.

MR. HANCOCK: Judge, I object to that, Your Honor. That's not so, and Mr. Rich knows it, and I would respectfully object. I ask the Court to rule on that. That's not proper [1111] argument, Your Honor.

THE COURT: I don't know what all these facts are. It's not a proper comment. I don't think there is any evidence on that.

MR. RICH: We are not in a high school debate. This is a life and death situation. Do the right thing. Bring back a verdict of life. Thank you, ladies and gentlemen. The verdict is yours.

THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what

punishment should be imposed upon the defendant for his crime of murder in the first degree, and as you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge.

However, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstance exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

[1112] Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.

Number one, that the defendant has been previously convicted of another capital offense or of a felony, involving the use or threat of violence to some person. The crime of sexual battery is a felony involving the use or threat of violence to another person.

Number two, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or attempt to commit the crime of sexual battery and/or kidnapping, and number three, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel, and number four, the crime for which the defendant is to be sentenced was

committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.

[1113] If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment, without the possibility of parole for twenty-five years. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

Among the mitigating circumstances you may consider, if established by the evidence, are: Number one, Dennis Sochor has no significant history of prior criminal activity. Number two, the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. Number three, the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person, and the defendant's participation was relatively minor.

Number four, the defendant acted under extreme duress or under the substantial domination of another person. Number five, the capacity of the defendant to appreciate the [1114] criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Number six, any other aspect of the defendant's character or record, and any other circumstance of the offense.

Each aggravating circumstance must be established beyond a reasonable doubt before it maybe [sic] considered by you in arriving at your decision. If one or more

aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive, in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory [1115] sentence must be based on these considerations.

In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous. The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.

Before you ballot, you should carefully weigh, sift, and consider the evidence and all of it realizing that a human life is at stake and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determines that Dennis Sochor should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of – and there is a blank space. You will fill in the number – advise

and recommend to the Court that it impose the death penalty upon Dennis Sochor.

On the other hand, if by six or more votes, the jury determines that Dennis Sochor should not be sentenced to death, your advisory sentence will be: The jury advises and [1116] recommends to the Court that it impose a sentence of life imprisonment upon Dennis Sochor, without possibility of parole for twenty-five years.

You may now retire to consider your recommendation, and when you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreman and returned to the Court. This is an advisory sentence. You may take these instructions back with you.

Members of the jury, you may retire now and consider your advisory sentence.

(Thereupon, the jury was excused to consider their advisory sentence.)

THE COURT: A verdict of guilty, Count I, murder in the first degree and also guilty of Count II, kidnapping, the Court adjudges the defendant guilty of Count I, murder in the first degree and also adjudge [sic] him guilty of kidnapping. He has not yet been – you should do that.

MR. RICH: There is no technical violation there.

THE COURT: It should be done now because [1117] I – either way gentlemen, we got to set a sentencing – not only a sentencing date either way, but also we have to resolve the other two cases. You want to listen to what I am saying, or you want to continue to talk? We

have a sentencing to set here, and we also have two other cases to be determined. If you'd like to talk about it, I think I can set it over about two weeks.

MR. RICH: The other two cases?

THE COURT: There is a violation of probation pending and also the grand theft charge.

MR. RICH: I was under the impression, Your Honor, that you were trying the violation of probation along with this trial.

THE COURT: Well, that may be, but there still has to be a determination on that.

MR. HANCOCK: That was my determination or my thinking, too, Your Honor, that you were hearing testimony from the trial to determine if there was a violation of probation.

THE COURT: He has also a grand theft charge.

MR. RICH: I think we can set that over. [1118] There will probably be a plea on that case.

THE COURT: Set two weeks from now would be November the 4th. That's a Wednesday.

MR. RICH: Fine, Judge.

MR. HANCOCK: We can do it on the Second, Your Honor. Would that interfere with your docket, the Second of November, because I think on the third and fourth, I have to be somewhere.

THE COURT: The second is no problem.

MR. HANCOCK: That would be better for me, Your Honor.

MR. RICH: Whatever, it wouldn't take too long.

THE COURT: November 2nd, nine o'clock.

MR. HANCOCK: Thank you, Judge.

THE CLERK: Are you going to set the other two for the same date?

THE COURT: Yes, we will set them then and make a determination.

(Thereupon, a short recess was taken, after which the following proceedings were had:)

THE COURT: Mr. Bailiff, has the jury reached their advisory sentence?

THE BAILIFF: They have, Your Honor.

THE COURT: Bring the jury in, please.

[1119] Members of the jury, have you reached your advisory sentence?

MS. SAYWARD: Yes, we have.

THE COURT: Would you hand it to the clerk, please? Read the verdict, Madam Clerk.

THE CLERK: Yes, Your Honor. In the Circuit Court of the 17th Judicial Circuit, Broward County, Florida, case number 86-15270 CF, Judge Russell E. Seay, State of Florida, plaintiff versus Dennis Sochor, defendant. The majority of the jury, by the vote of ten to two, advises and recommends to the Court that it impose the death penalty upon Dennis Sochor, Jean B. Sayward, foreman, October 21st, 1987.

THE COURT: That's the verdict, the sentence of each and every one of you?

THE JURY: Yes.

THE COURT: It will be received and filed of record. We will set the sentencing for November the Second at nine o'clock.

Members of the jury, I thank you very much for your service. I appreciate that you were willing to stay here later this evening and render this advisory sentence.

We do have a certificate for you, and [1120] since the hour is late, you will be sent a check for your service through the mail.

I appreciate your consideration and patience. I had other matters, you know, while this case was pending, and so it sort of interfered, so I do appreciate you working with us.

Members of the jury, you are excused now, and you may leave.

(Thereupon, the jury was excused.)

THE COURT: Any other matters to come before the Court?

MR. HANCOCK: None by the State, Your Honor.

MR. RICH: No, Your Honor.

THE COURT: Sentencing is set for November 2nd, at nine o'clock. Court is adjourned.

(Thereupon, an adjournment was taken to 9:00 a.m., November the 2nd, 1987, at which time the following proceedings were had:)

* * *

[1122] (Thereupon, the following proceedings were had:)

THE CLERK: Dennis Sochor.

THE COURT: I'm going to let him sit at the table, Kelly.

Oh, incidentally, how does he score on that kidnapping?

MR. HANCOCK: Judge, I'll do a quick scoring on that. Here's his scoring on the sexual battery.

THE CLERK: There's three cases here.

THE COURT: Well, the grand theft's still pending now?

MS. KAPLAN: Judge, this scoring is with the grand theft.

THE COURT: Now, it was agreed that the violation of probation would be held along with the trial.

MR. RICH: Yes, sir.

THE COURT: And the same facts submitted?

MR. RICH: Yes, sir.

As far as the grand larceny is concerned, I am sure we can just enter a plea of nolo, to run concurrent with any sentence he gets on the other charge.

[1123] THE COURT: Well, assuming that's what he wants to do.

MR. RICH: Yes, Your Honor, that is his pleasure.

THE COURT: All Right. Dennis Sochor, you have this grand theft charge pending, having to do with that truck. It has not been tried yet. I understand you want to change your plea from not guilty to guilty on the grand theft charge?

THE DEFENDANT: That's right.

THE COURT: And waive your right to have a trial?

THE DEFENDANT: That's right.

THE COURT: All right. Do you understand, you won't hear any witnesses testify against you and you lawyer won't be able to cross-examine them and you won't be able to testify in the case?

THE DEFENDANT: Yes.

THE COURT: Or call witnesses to your defense?

THE DEFENDANT: That's right.

THE COURT: Okay, then, it was agreed during the trial on the murder in the first degree and kidnapping charge that the Court [1124] would also consider those facts as pertaining to the violation of probation on the sexual battery and kidnapping; right?

MR. RICH: Yes, Your Honor. Since we're not entitled to a jury trial on the violation of probation – it is strictly a court hearing – and I think the Court –

THE COURT: Well, the Court heard all the –

MR. RICH: The Court is fully aware of all the evidence heard in the violation of probation.

THE COURT: The Court heard all the evidence and, also, along with the jury, the jury has found him guilty of murder in the first degree and kidnapping.

Was there an adjudication on that originally?

THE CLERK: On the violation; yes. And also, adjudication on the trial.

THE COURT: Everything but the grand theft; right?

THE CLERK: Yes.

THE COURT: All right. Then we're here this morning for sentencing on the murder in [1125]-the first degree and, Count II, of kidnapping.

Also, the sexual battery that he's on probation and kidnapping and the grand theft.

Is there anything to be said why sentence should not be imposed?

MR. RICH: Do you want us to approach the bench, Your Honor?

THE COURT: Do it from there. It will take a few minutes.

MR. RICH: Your Honor heard all the evidence and all the testimony. I think that the strong mitigating factor was the uncontroverted testimony of the defense witnesses, the parents.

That he has lived a very much abused childhood, plus, the testimony of the psychiatrist that he's a confirmed abuser of alcohol and drugs.

I feel that the basis of those two factors, the psychological report and the history of his childhood, that the man is, maybe, not legally insane, but he certainly is, to my mind and to the psychiatric mind that he has a personality disorder of some kind.

I know that doesn't excuse it, but by [1126] way of mitigation, it might circumvent or obviate the necessity for the death penalty. And I would urge that the Court consider those in passing sentence.

Mr. Sochor, do you want to say anything?

THE DEFENDANT: Well, Your Honor, when I was younger, I realized – at certain times when I was beaten, I ran to my room, if I could run or scream or crawl and I know I wanted my parents dead. And then I would pray to God, thinking he was there, please don't kill them. I didn't mean that.

I know, as a young boy in school, private Catholic school, literature was a very much loved subject and I would write my own book reports rather than read them. But for some reason, when I would write, I would have problems thinking things through. And since I've been incarcerated, I've been working on works of poetry and I stated in the police deposition that during the past five or

six years, I only tried to help people and give of myself as much as possible, knowing that I did not know what happened for sure five or six years ago.

In my heart, the only way I can live with [1127] myself is I didn't know if that thing happened because I was intoxicated to a point that I did black out.

And I said many things because I did not know and maybe to protect my brother, because I did not know.

I have contemplated suicide since I've been incarcerated because I felt if I could hurt or kill somebody I really don't deserve to live myself.

But the only thing that kept me going was, I didn't know if I committed that act for sure.

And if given the death sentence or 25 years, any works or writing and the moneys thereof will be donated to charities, children or any available charity that is possible because I would like to leave something behind in this world.

I have set out to do many things in my life and achieved none of them for some reason. So maybe I'll achieve all the love that is in my heart that was never really brought out, ever.

Thank you, Your Honor. And I would like [1128] to apologize and offer my deepest sympathies to Mrs. Ryan. And I know, in my heart, that I could not willingly hurt or murder anyone in my right frame of mind.

I thank you.

THE COURT: Count I, on that kidnapping count, sexual battery was nol prossed at the time of the probation; right?

MR. HANCOCK: That is correct, Your Honor.

I have done a score sheet, Your Honor, on the kidnapping that he was found guilty of in Count II of the present indictment and I have total points of 369.

I'll have Mr. Rich look at that.

I do have some letters that the Ryan family would like the Court to just read briefly about their feelings, how they have suffered as a result of the death.

THE COURT: Do you have the score on the other, on the sexual battery and the grand theft?

MR. HANCOCK: Here's that charge on kidnapping, Count II. Mr. Rich has looked at that.

[1129] THE COURT: 17 to 22.

All right. Saying nothing sufficient, the defendant, Dennis Sochor, having been found guilty by a jury of murder in the first degree and, also, Count II, kidnapping, having been adjudged guilty, also, the Court finds that he has violated his probation and is adjudged guilty of sexual battery.

I think he had been previously adjudged, hadn't he, Debbie?

THE CLERK: Yes.

THE COURT: Also, the Court accepts the change of plea from not guilty to guilty to grand theft.

He hasn't been adjudicated on that one.

Adjudge him guilty of grand theft.

The defendant, Dennis Sochor, was indicted on October 9th, 1986 for the crimes of murder in the first degree in Count I and kidnapping in Count II of the indictment.

The case was tried before a duly impaneled jury commencing on October 13th, 1987, and concluding on October 20th, 1987.

The jury, having heard the evidence and the law instructed by the Court, concluded the [1130] guilt phase of the trial by finding the defendant guilty of first degree murder and of kidnapping as charged in the indictment.

On October 21st, 1987, a separate proceeding on the issue of penalty was conducted before the same trial jury as mandated by the provisions of Florida Statutes 921.141(1).

After hearing further testimony, argument of counsel, instructions by the court, and due deliberations, the jury returned an advisory sentence of death by a vote of 10 to 2.

Pursuant to the provisions of Florida Statute 921.141(3), the Court hereby makes the following findings of fact:

Aggravating circumstances, number one. The Court finds, according to Florida Statute 921.141(5)(b), that the defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to another person.

The defendant was arrested on March 14th, 1980, for sexual battery and kidnapping.

In State of Florida versus Dennis Paul Grant, Case Number 80-2497-CF, the defendant, [1131] Dennis Sochor, using the alias of Dennis Paul Grant pled to sexual battery and was sentenced on September 30th, 1980.

Number two. The Court finds, according to Florida Statute 921.141(5)(d), that the crime for which the defendant is to be sentenced was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit any sexual battery or kidnapping.

The jury convicted the defendant of kidnapping in Count II of the indictment. There is sufficient evidence to prove the victim was taken from the Banana Boat and, at some point, held against her will.

She was forcibly dragged out of the truck as she resisted and pleaded for help.

As to the attempt to commit sexual battery, the defendant, from his own statements to law enforcement officers, indicated he wanted sex and when the victim refused him, he became angry and a fight ensued. The defendant said he had these urges for sex. Even though there was no evidence the defendant actually sexually assaulted the victim, [1132] the body was never found, the defendant's admissions prove the death occurred as he was attempting to sexually assault her.

The Court finds that both of these felonies were committed or attempted to be committed but the Court considers this as only one aggravating circumstance.

Number three. The Court finds, according to Florida Statute 921.141(5)(h), that the capital felony was especially heinous, atrocious or cruel.

The evidence indicated that the victim was forcibly removed from the truck while she pleaded for help and even begged for her life.

Even though Patricia Gifford's body was never recovered and no one knows how badly she was beaten, the defendant admitted in his statements that as he choked her, she resisted and fought him.

There were several fingernail marks on his face, which substantiates that a violent struggle ensued as confirmed by the defendant's statements to the police officers.

Dr. Wright testified that asphyxiation [1133] is a slow and painful death.

Fear and emotional trauma preceding the victim's death may be considered as contributing to the heinous nature of the capital felony. It is clear there was fear and definitely emotional trauma before her death.

Number four. The Court finds, according to Florida Statute 921.141(5)(i), that the crime for which the defendant is to be sentenced was committed in a cold, calculated and premediated [sic] manner without any pretense of moral or legal justification.

The evidence indicated that the defendant pulled the victim out of the pick-up at night along an abandoned road and proceeded to strangle her. He disposed of the body so it could never be found. The defendant had previously been put on probation for sexual battery and

knew the consequences if the victim survived and notified the police department.

There is no question that it was committed in a cold and calculating manner as the defendant told a witness who testified that he had choked someone to death in Fort Lauderdale, Florida, and how easy it was to do.

[1134] Furthermore, a cellmate testified that the defendant had stated he had "killed the fucking slut bitch."

There is no pretense of moral or legal justification.

Mitigating circumstances; number one. The defendant has no significant history of prior criminal activity. This mitigating circumstance does not apply. To the contrary, the defendant has a most significant history of prior criminal activity. The defendant admitted he had committed a rape in Michigan, which case is still pending.

According to the doctor's reports introduced in evidence and all of the testimony, it indicates a very significant history of criminal activity.

Number two. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

This mitigating circumstance does not apply. The doctors who testified all found the defendant competent and that he did not meet the criteria for involuntary hospitaliza- [1135] tion pursuant to the Baker Act. However, he was diagnosed as a [sic] extremely dangerous and violent.

Even though the defendant claimed to the doctors he could not remember what happened, the Court finds, as Dr. Costello testified, that the defendant suffered from "selective amnesia," and attempted to mislead the doctors as to his recollections of the murderous incident.

Number three. The victim was a participant in the defendant's conduct or consented to the act. This mitigating circumstance does not apply. The victim, Patricia Gifford, was a helpless and fearful 18-year-old girl and in no way consented to this act.

Number four. The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. This mitigating circumstance does not apply.

All the evidence indicated that, even though the defendant's brother was there, he attempted to stop the defendant from committing this brutal murder.

Five. The defendant acted under extreme [1136] duress or under the substantial domination of another person. This mitigating circumstance does not apply.

Six. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. This mitigating circumstance does not apply.

All the credible evidence indicates that the defendant was able to appreciate the criminality of his conduct and was able to conform his conduct to the requirements of law if he so desired.

He told a witness, who testified during the trial, that he had choked someone in Fort Lauderdale, Florida, and it was so easy that he could do it again.

Even though the defendant maintained he was intoxicated during the crime, the testimony from all the witnesses showed, though he may have had some alcoholic drinks, he was still in control of his actions and behavior and knew what was happening.

His ex-wife testified that he acted violently even when he was not under the [1137] influence of alcohol.

Seven. The age of the defendant at the time of the crime. This mitigating circumstance does not apply. The defendant's birth date is February 25th, 1952, and at the time of the crime he was 29 years old.

Eight. Any other aspect of the defendant's character of record and any other circumstance of the offense. There were several members of the defendant's family who tearful [sic] and grievously testified. However, after considering their testimony, this Court finds no non-statutory "mitigating" circumstances.

In summary, it is the conclusion of the Court after carefully and conscientiously weighing the aggravating and mitigating circumstances, that there are sufficient aggravating circumstances to justify and warrant the imposition of the death penalty and that there are no mitigating circumstances to outweigh the aggravating circumstances.

It is, therefore, the sentence of this Court that you, Dennis Sochor, be sentenced to death for the murder of Patricia Gifford.

[1138] It is further ordered that you, Dennis Sochor, be taken by the proper authorities to the Florida State Prison and be kept in close confinement until the day of your execution, and on that day, you be put to death by electrocution, which is the manner prescribed by law, and may God have mercy on your soul.

You, Dennis Sochor, are hereby notified that the judgment of conviction and the sentence of death are subject to automatic review by the Supreme Court of Florida.

You are further advised that you have the right to the assistance of counsel in the filing and preparation of your appeal. If you cannot afford your own attorney, you should advise the Court and an attorney will be appointed for you.

Done and ordered in open court, Broward County Courthouse, Fort Lauderdale, Flroida, [sic] this 2nd day of November, 1987.

MR. RICH: In connection with that, Your Honor, I have prepared notice of appeal, which I'll file today, together with directions of the Clerk and the court reporter, which I'll [1139] show to the Court.

I have copies for counsel.

I also have an order for the Court indicating that these papers will be filed. I suppose I should file them first with the clerk downstairs, the appeals clerk.

And I also have a request and an order for appointment of the Public Defender for the purpose of the appeal.

I should file a motion for a new trial. I thought I had those with me. I didn't bring it with me, Your Honor. I'll file a motion for new trial with an order today and I will then file these other papers. I thought I had them with me, but I see I don't. I know I prepared it. I just didn't put it in the file.

I have prepared a motion for new trial with an order, which we can set down for hearing later on this afternoon.

THE COURT: All right.

MR. RICH: And get that disposed of before I file all these other papers.

But I wanted to indicate to the Court now that he is indigent and that he does need [1140] someone to handle his appeal.

THE COURT: File these later.

MR. RICH: I'll file them later, as soon as we have a hearing. I'll have that hearing sometime this afternoon and I'll get copies.

THE COURT: All right.

On Case 80-2497, the defendant, having heretofore been adjudged guilty of sexual battery, it is the sentence of the law that the defendant is hereby committed to the custody of the Department of Corrections to be imprisoned for a term of natural life. That will run concurrent.

Also, on Count II of the indictment, murder in the first degree, he is heretofore been found guilty by the jury

and adjudged guilty of kidnapping, and it is the sentence of the law that the defendant is hereby committed to the custody of the Department of Corrections to be imprisoned for a term of 22 years to run concurrent.

82-198, adjudge him guilty of grand theft and he's committed to the custody of the Department of Corrections for a term of five years to run concurrent.

[1141] They'll need fingerprints on the grand theft.

THE BAILIFF: All right, Dennis, step over there.

MR. RICH: Maybe we can have that motion for a new trial in the morning at 10:00.

THE COURT: I'll have docket call at 9:00 in the morning.

MR. RICH: Because Mr. Hancock will not be available this afternoon, so I apologize to the Court. I had it ready and forgot to bring it.

THE COURT: All right.

MR. RICH: I do have it typed up, but I forgot to bring it.

THE COURT: All right.

(Thereupon, the sentencing was concluded.)

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
BROWARD COUNTY, FLORIDA

(Caption Omitted In Printing)

SENTENCE ORDER

The Defendant, Dennis Sochor, was indicted on October 9, 1986 for the crimes of Murder In The First Degree in Count I and Kidnapping in Count II of the Indictment.

The case was tried before a duly empaneled jury commencing on October 13, 1987 and concluding on October 20, 1987. The jury, having heard the evidence and the law instructed by the Court, concluded the guilt phase of the trial by finding the Defendant guilty of First Degree Murder and of Kidnapping as charged in the Indictment.

On October 21, 1987, a separate proceeding on the issue of penalty was conducted before the same trial jury as mandated by the provisions of Florida Statutes 921.141(1). After hearing further testimony, argument of counsel, instructions by the Court, and due deliberations, the jury returned an advisory sentence of death by a vote of ten (10) to two (2).

Pursuant to the provisions of Florida Statute 921.141(3), the Court hereby makes the following findings of fact:

AGGRAVATING CIRCUMSTANCES

1. The Court finds, according to Florida Statute 921.141(5)(b), that the Defendant was previously convicted of another capital felony or

of a felony involving the use or threat of violence to another person. The Defendant was arrested on March 14, 1980 for Sexual Battery and Kidnapping. In *State of Florida vs. Dennis Paul Grant*, Case #80-2497-CF, the Defendant, Dennis Sochor, using the alias of Dennis Paul Grant, pled to Sexual Battery and was sentenced on September 30, 1980.

2. The Court finds, according to Florida Statute 921.141(5)(d), that the crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit any Sexual Battery or Kidnapping. The jury convicted the Defendant of Kidnapping in Count II of the Indictment. There is sufficient evidence to prove the victim was taken from the Banana Boat and at some point held against her will. She was forcibly dragged out of the truck as she resisted and pleaded for help. As to the attempt to commit Sexual Battery, the Defendant, from his own statements to law enforcement officers, indicated he wanted sex and when the victim refused him he became angry and the fight ensued. The Defendant said he had these urges for sex. Even though there is no evidence the Defendant actually sexually assaulted the victim as the body was never found, the Defendant's admissions prove the death occurred as he was attempting to sexually assault her. The Court finds that both of these felonies were committed or attempted to be committed but the Court considers this as only one aggravating circumstance.

3. The Court finds, according to Florida Statute 921.141(5)(h), that the capital felony was especially heinous, atrocious or cruel. The evidence indicated that the victim was forcibly removed from the truck while she pleaded for help and even begged for her life. Even though Patricia Gifford's body was never recovered and no one knows how badly she was beaten, the Defendant admitted in his statements that as he choked her she resisted and fought him. There were several fingernail marks on his face which substantiates that a violent struggle ensued as confirmed by the Defendant's statements to the police officers. Dr. Wright testified that asphyxiation is a slow and painful death. Fear and emotional trauma preceeding the victim's death may be considered as contributing to the heinous nature of the capital felony. It is clear there was fear and definitely emotional trauma before her death.

4. The Court finds, according to Florida Statute 921.141(5)(i), that the crime for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The evidence indicated that the Defendant pulled the victim out of the pickup at night along an abandoned road and proceeded to strangle her. He disposed of the body so it could never be found. The Defendant had previously been put on probation for Sexual Battery and knew the consequences if the victim survived and notified the Police Department. There is no question that it was committed in a cold and

calculating manner as the Defendant told a witness who testified that he had choked someone to death in Fort Lauderdale, Florida and how easy it was to do. Furthermore, a cellmate testified that the Defendant had stated he had "killed the fucking slut bitch." There is no pretense of moral or legal justification.

MITIGATING CIRCUMSTANCES

1. The Defendant has no significant history of prior criminal activity. This mitigating circumstance does not apply. To the contrary, the Defendant has a most significant history of prior criminal activity. The Defendant admitted he had committed a rape in Michigan which case is still pending. According to the Doctors' report introduced in evidence and all of the testimony, it indicates a very significant history of criminal activity.

2. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. This mitigating circumstance does not apply. The doctors who testified all found the Defendant competent and that he did not meet the criteria for involuntary hospitalization pursuant to the Baker Act. However, he was diagnosed as extremely dangerous and violent. Even though the Defendant claimed to the doctors he could not remember what happened, the Court finds as Dr. Castillo testified that the Defendant suffered from "selective amnesia" and attempted to mislead the doctors as to his recollections of the murderous incident.

3. The victim was a participant in the Defendant's conduct or consented to the act. This mitigating circumstance does not apply. The victim, Patricia Gifford, was a helpless and fearful 18 year old girl and in no way consented to this act.

4. The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. This mitigating circumstance does not apply. All the evidence indicated that, even though the Defendant's brother was there, he attempted to stop the Defendant from committing this brutal murder.

5. The Defendant acted under extreme duress or under the substantial domination of another person. This mitigating circumstance does not apply.

6. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. This mitigating circumstance does not apply. All the credible evidence indicates that the Defendant was able to appreciate the criminality of his conduct and was able to conform his conduct to the requirements of law if he so desired. He told a witness who testified during the trial, that he had choked someone in Fort Lauderdale, Florida and it was so easy that he could do it again. Even though the Defendant maintained he was intoxicated during the crime, the testimony from all the witnesses showed, though he may have had some alcoholic drinks, he was still in control of his actions and behavior and knew what

was happening. His ex wife testified that he acted violently even when he was not under the influence of alcohol.

7. The age of the Defendant at the time of the crime. This mitigating circumstance does not apply. The Defendant's birth date is February 25, 1952 and at the time of the crime he was twenty-nine (29) years old.

8. Any other aspect of the Defendant's character or record and any other circumstance of the offense. There were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory "mitigating" circumstances.

In Summary, it is the conclusion of the Court, after carefully and conscientiously weighing the aggravating and mitigating circumstances, that there are sufficient aggravating circumstances to justify and warrant the imposition of the death penalty and that there are no mitigating circumstances to outweigh the aggravating circumstances. It is, therefore,

THE SENTENCE OF THIS COURT that you, Dennis Sochor, be sentenced to death for the murder of Patricia Gifford.

It is further ordered that you, Dennis Sochor, be taken by the proper authorities to the Florida State Prison and be kept in close confinement until the day of your execution and that on that day you be put to death by electrocution, which is the manner prescribed by law, and may God have mercy on your soul.

You, Dennis Sochor, are hereby notified that the judgment of conviction and the sentence of death are subject to automatic review by the Supreme Court of Florida. You are further advised that you have the right to the assistance of counsel in the filing and preparation of your appeal. If you cannot afford your own attorney, you should advise the Court and an attorney will be appointed for you.

DONE AND ORDERED in open court, Broward County Courthouse, Fort Lauderdale, Florida, this 2 day of November, 1987.

/s/ Russell E. Seay, Jr.
HONORABLE RUSSELL E. SEAY, JR.
Circuit Court Judge

87455081

IN THE CIRCUIT COURT, SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

DIVISION FD R.E. SEAY, JR.

CASE NUMBER 86-15270CF

ST. ATTY. KELLY HANCOCK

CT. RPTR. PATTY JENNINGS

STATE OF FLORIDA

-vs-

Dennis Sochor
Defendant

JUDGMENT

The Defendant, Dennis Sochor, being personally before this Court represented by Charles Rich, his attorney of record, and having:

(Check Applicable Provision)

■ Been tried and found guilty of the following crime(s)

___Entered a plea of guilty to the following crime(s)

___Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME
I	MURDER FIRST DEGREE

OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
782.04(1)	CF	
787.01	LF	

and no cause having been shown why the Defendant should not be adjudicated guilty. IT IS ORDERED THAT the Defendant hereby ADJUDICATED GUILTY of the above crime(s)

The Defendant is hereby ordered to the sum of twenty dollars ($20.00) waive costs pursuant to F.S.960.20 (Crimes Compensation Trust fund. The Defendant is further ordered to pay the sum of five dollars ($5.00) as a court cost pursuant to F.S.943.25(4).

___ The Defendant is ordered to pay an additional sum of two dollars ($2.00) pursuant to F.S.943.25(8). (This provision is optional: not applicable unless checked).

(Check if Applicable)

___ The Defendant is further ordered to pay a fine in the sum of $ _____ pursuant to F.S. 775.0835.

(This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s)).

___ The Court hereby imposes additional court costs in the sum of $ _____

Imposition of Sentence Stayed and Withheld *(Check if Applicable)*

___ The Court hereby stays and withholds the imposition of sentence as to count(s) _____

and places the Defendant on probation for a period of _____

under the supervision of the Department of Corrections (conditions of probation set forth in separate order.)

Sentence Deferred Until Later Date Waive *(Check if Applicable)*

■ The Court hereby defers imposition of sentence until Nov. 2, 1987.

(date)

___ Pay $200.00 Trust Fund Pursuant to F.S.27.3455

___ Serve 50.3 hours Community Service Pursuant to F.S.27.3455

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigence.

COUNT(S) ___:___ DAYS BROWARD CO. JAIL

WITH CREDIT FOR ___ DAYS TIME SERVED.

/s/ Illegible
JUDGE

(Fingerprints Omitted In Printing)

/s/ A. Piazza, COURT DEPUTY
Name and Title

DONE AND ORDERED in Open Court at Broward County, Florida this 21 day of OCTOBER A.D., 1987. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, DENNIS SOCHOR and that they were placed thereon by said Defendant in my presence in Open Court this date.

1227

/s/ Illegible
JUDGE

RECORDED IN THE OFFICIAL RECORDS BOOK
OF BROWARD COUNTY, FLORIDA
L. A. HESTER
COUNTY ADMINISTRATOR

Defendant DENNIS SOCHOR aka DENNIS GRANT

Case Number 86-1527OCF

SENTENCE

(As to Count I)

The Defendant, being personally before this Court accompanied by his attorney, CHARLES RICH, S.P.D., and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

XXX and the Court having on OCT. 21, 1987 (date) deferred imposition of sentence until this date.

(Check either provision if applicable) ___ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein.

IT IS THE SENTENCE OF THE LAW that;

___ The Defendant pay a fine of $___, plus $___ as the 5% surcharge required by F.S. 960.25.

XXX The Defendant is hereby committed to the custody of the Department of Corrections

___ The Defendant is hereby committed to the custody of the Sheriff of Broward County, Florida *(Name of local corrections authority to be inserted at printing, if other than Sheriff)*

To be imprisoned (check one; unmarked sections are inapplicable)

___ For a term of Natural Life

XXX For a sentence of Death by Electrocution

___ For an indeterminate period of 5 months to ___ years.

___ Followed by period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

If "split" sentence complete either of these two paragraphs ___ However, after serving a period of _____ imprisonment in ____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm – 3 year mandatory minimum ___ it is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking – mandatory minimum — It is further ordered that the _____ year minimum provisions of F.S.893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction — The Court pursuant to F.S.947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender — The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S.775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit XXX It is further ordered that the Defendant shall be allowed total of ONE YEAR & 157 DAYS credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/ Concurrent It is further ordered that the sentence imposed for this count shall run _____ consecutive to _____ concurrent with (check one) the sentence set forth in count _____ above.

CC1-3

Page 1 of 2

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Defendant DENNIS SOCHOR aka DENNIS GRANT

Case Number 86-1527OCF

SENTENCE

(As to Count II)

The Defendant, being personally before this Court accompanied by his attorney, CHARLES RICH, S.P.D., and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

XXX and the Court having on OCT. 21, 1987 (date) deferred imposition of sentence until this date.

(Check either provision if applicable) — and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein.

IT IS THE SENTENCE OF THE LAW that;

— The Defendant pay a fine of $___, plus $___ as the 5% surcharge required by F.S. 960.25.

XXX The Defendant is hereby committed to the custody of the Department of Corrections

___ The Defendant is hereby committed to the custody of the Sheriff of Broward County, Florida *(Name of local corrections authority to be inserted at printing, if other than Sheriff)*

To be imprisoned (check one; unmarked sections are inapplicable)

___ For a term of Natural Life

XXX For a term of TWENTY TWO (22) YEARS

___ For an indeterminate period of 6 months to ____ years.

___ Followed by period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

If "split" sentence complete either of these two paragraphs

___ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm – 3 year mandatory minimum

___ it is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking – mandatory minimum

___ It is further ordered that the _____ year minimum provisions of F.S.893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction

___ The Court pursuant to F.S.947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Offender

___ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S.775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit

XXX It is further ordered that the Defendant shall be allowed total of ONE YEAR & 157 DAYS credit for such time as he has been incarcerated prior to imposition

of this sentence. Such credit reflects the following periods of incarceration (optional):

Consecutive/ Concurrent It is further ordered that the sentence imposed for this count shall run ___ consecutive to XX concurrent with (check one) the sentence set forth in count I above.

Consecutive/ Concurrent (As to other convictions) It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ___ consecutive to XX concurrent with (check one) the following:

___ Any active sentence being served.

XXX Specific sentences: 80-2497CF & 82-198CF

In the event the above sentence is to the Department of Corrections, the Sheriff of Broward County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgment and Sentence.

The Defendant *in Open* Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further recommends WAIVE ALL COSTS.

DONE AND ORDERED in Open Court at Broward County, Florida, this 2 day of NOVEMBER A.D, 1987.

BROWARD COUNTY, FLORIDA

/s/ Illegible
JUDGE

cf-3
1238

SUPREME COURT OF FLORIDA

No. 71,407

DENNIS SOCHOR, Appellant,

v.

STATE OF FLORIDA, Appellee.

[May 2, 1991]

PER CURIAM.

Dennis Sochor appeals his convictions of kidnapping and first-degree murder and sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the convictions and the death sentence.

Testimony at trial established that, on December 31, 1981, the victim, an eighteen-year-old female, and a friend went to a lounge located in Broward county to celebrate New Year's Eve. During the course of the evening the friend became ill. Sochor and his brother, Gary, helped the victim escort her friend outside to her car. Promising her that she would return soon, the victim returned to the lounge.

Early the next morning the friend awoke in the car, discovered the victim missing, and called the police. The police obtained a photograph taken that night which showed an unidentified man sitting at the bar near the victim. The photograph was shown on television, and, several days later, that man was identified as Sochor. The police talked with Sochor's roommates who said that he had left suddenly when he saw his picture on television.

They also told police that Sochor's brother, Gary, had been visiting him and had recently returned to Michigan. The police interviewed Gary who implicated his brother in the victim's disappearance and voluntarily returned to Florida to attempt to locate her body. In May 1986 authorities arrested Sochor in Georgia on an unrelated offense and extradited him to Florida where a grand jury indicted him on charges of first-degree murder and kidnapping. The victim's body has never been recovered.

At trial Gary gave the following testimony. He went to the lounge on New Year's Eve with his brother who spent the evening talking with the victim and her friend. When it came time to leave, the victim and his brother were kissing in the lounge parking lot while Gary waited in the truck. Several minutes later, she agreed to go to breakfast with them. They left the parking lot with Sochor driving his employer's truck, Gary in the passenger seat, and the victim seated between them. Sochor drove to a secluded spot nearby and stopped the truck. Gary remembered the victim screaming for help and seeing Sochor on top of her with her hands pinned down on the ground. He yelled at him and threw a rock over his head. In response Sochor stopped assaulting the victim, turned and looked at Gary like a man "possessed," angrily told him to get back in the truck, and resumed his assault. Awhile later Sochor got in the truck with Gary and drove home. The next morning Gary found a woman's shoe and sweater and a set of keys in the truck. He hid the keys. Later he noticed that the truck had been cleaned and the articles removed. When told about the keys, Sochor became upset and demanded their return,

which Gary did. A few days later Gary returned to Michigan.

The state also introduced Sochor's three taped confessions which it played to the jury. In these statements Sochor said that he met the victim that night at the bar and spent the evening talking with her. He remembered kissing her in the lounge parking lot and wanting to have sex. When she refused, they argued and he grabbed her. When she hit him, he became angry and choked her. He thought that he killed her and drove to a secluded area where he disposed of the body. He said that Gary was not with him when this happened. When he awoke the next morning, he remembered feeling that something terrible had happened. He thought he had raped "another girl." He also stated that he found several woman's articles in the truck which he put in the trash. When he saw his picture on television, he took his employer's truck and drove to Tampa.[1] From there he went to New Orleans where he stayed for some time before moving to Atlanta where he was arrested.

The jury convicted Sochor of both kidnapping and first-degree murder and, by a vote of ten to two, recommended the death penalty. The trial judge sentenced Sochor to death, finding four aggravating,[2] and no

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[1] Several weeks after the victim's disappearance police found the truck abandoned in Tampa.

[2] The court found the following aggravating factors: (1) Sochor was previously convicted of a felony involving the use or threat of violence to the person, § 921.141(5)(b), Fla. Stat.

(Continued on following page)

mitigating, circumstances. Sochor now appeals, claiming errors in both the guilt and sentencing phases of his trial.

Sochor raises numerous claims of error in the guilt phase. His first claim is that there was insufficient evidence to convict him of either premeditated or felony murder.[3] Assuming that there are sufficient facts to present the issue to the jury, whether the evidence shows premeditation is a question of fact for the jury to decide. *Preston v. State*, 444 So.2d 939 (Fla. 1984). As this Court has previously stated:

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of his victim is concerned. No definite length of time

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(Continued from previous page)

(1989); (2) the killing was committed while Sochor was engaged in the commission of a felony, § 921.141(5)(d); (3) the killing was especially heinous, atrocious, or cruel, § 921.141(5)(h); and (4) the killing was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, § 921.141(5)(i).

[3] The verdict form did not indicate whether the jurors found Sochor guilty of first-degree murder based on premeditation or felony murder. Defense counsel neither requested such a specialized jury verdict form nor is one required. Brown v. State, 473 So.2d 1260 (Fla.), *cert. denied*, 474 U.S. 1038 (1985).

> for it to exist has been set and indeed could not be.

Larry v. State, 104 So.2d 352, 354 (Fla. 1958). *Accord Preston; Sireci v. State*, 399 So.2d 964 (Fla. 1981), *cert. denied*, 456 U.S. 984 (1982).

After examining the record, we find sufficient evidence to present the issue of premeditation to the jury and from which the jury could have found premeditation. In addition to the circumstances of the crime, Gary testified that, while the victim screamed for help, he interrupted Sochor who stopped assaulting her long enough to turn, look at Gary, and shout at him to get back in the truck. Sochor then resumed his attack. Thus, he had a sufficient period of reflection to contemplate the nature of his act. He could have stopped his assault at that point but chose to continue. We find Sochor's claim that the offense was a heat-of-passion type homicide insufficient to preclude a finding of premeditation.

We also find sufficient evidence of kidnapping to support Sochor's conviction on a felony-murder theory.[4] The evidence adduced at trial shows that, although the victim may have entered the truck voluntarily, at some point she was held unwillingly. Her removal from the lounge parking lot to a secluded area facilitated Sochor's acts, avoided detection, and was not merely incidental to, or inherent in, the crime. Thus, the evidence supports the

[4] The court instructed the jury that it could find felony murder based on the felonies of kidnapping or sexual battery, attempt to commit either crime, or escaping from the immediate scene of a kidnapping or sexual battery.

underlying felony of kidnapping as well as Sochor's separate conviction of kidnapping. *See Carron v. State*, 427 So.2d 192 (Fla. 1983); *Faison v. State*, 426 So.2d 963 (Fla. 1983); *Mobley v. State*, 409 So.2d 1031 (Fla. 1982).[5]

Sochor next claims that the trial court improperly admitted his confessions because the state did not independently prove the corpus delicti of the homicide. An individual's confession to a crime is insufficient evidence of a criminal act where no independent evidence exists to substantiate the occurrence of the crime. *State v. Allen*, 335 So.2d 823 (Fla. 1976). Because the victim's body has never been found, Sochor contends that the state has no evidence, other than his confession, that she is dead. In proving corpus delicti, however, circumstantial evidence is sufficient. *Buenoano v. State*, 527 So.2d 194 (Fla. 1988). Proof beyond a reasonable doubt is not necessary. *Stano v. State*, 473 So.2d 1282 (Fla. 1985), *cert. denied*, 474 U.S. 1093 (1986); *Bassett v. State*, 449 So.2d 803 (Fla. 1984). The victim disappeared New Year's Eve and has not been seen since that night. It was uncharacteristic for her not to come home. She had a good relationship with her family and her boyfriend and kept in touch. None of her belongings were missing from her apartment. Gary testified that when he last saw the victim she was screaming for help with his brother on top of her. We find sufficient evidence that the victim is indeed dead and that her

[5] We also find sufficient evidence in the record to support the underlying felony of attempted sexual battery. Sochor stated that he wanted to have sex with the victim and that he felt an uncontrollable urge to do so. The next day he thought he had raped "another girl." Gary testified that he saw Sochor on top of the victim while she resisted.

death was due to the criminal agency of Dennis Sochor. Moreover, Sochor, in closing argument, did not contest the fact that she was dead. Rather, counsel based the defense strategy on the theories of voluntary intoxication or mistaken identity, i.e., that Gary actually committed the crime.[6]

Sochor next complains of various errors which, taken as a whole, led to an unfair trial. He acknowledges that counsel did not object at trial to any of the complained-of errors and, pursuant to the contemporaneous objection rule, they are not preserved for review. *See Wainwright v. Sykes*, 433 U.S. 72 (1977); *Jones v. State*, 449 So.2d 253 (Fla.), *cert. denied*, 469 U.S. 893 (1984). Despite the lack of objections, Sochor contends that (1) the trial was so unfair that fundamental error occurred and (2) the contemporaneous objection rule has less force in a capital case. This Court has previously rejected the second argument. *Rose v. State*, 461 So.2d 84 (Fla. 1984), *cert. denied*, 471 U.S. 1143 (1985); *see Pope v. Wainwright*, 496 So.2d 798 (Fla. 1986), *cert. denied*, 480 U.S. 951 (1987); *Jones v. Wainwright*, 473 So.2d 1244 (Fla. 1985).

As to the first argument, fundamental error occurs in cases "where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." *Ray v. State*, 403 So.2d 956, 960 (Fla. 1981). The error must amount to a denial of due process. *Ray; Castor v. State*, 365 So.2d 701 (Fla. 1978). After carefully

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[6] Sochor also contends there was insufficient evidence of venue and that the state failed to prove his sanity at the time of the offense beyond a reasonable doubt. We find these claims without merit.

reviewing the record, we find that the claimed errors, taken individually or collectively, do not constitute fundamental error.[7] Thus, we reject Sochor's claim.

Likewise, although Sochor now claims various errors in the jury instructions, his counsel neither objected to the challenged instructions nor requested other instructions. Thus, in the absence of fundamental error, these claims also are precluded from appellate review. *See Adams v. State*, 412 So.2d 850 (Fla.), *cert. denied*, 459 U.S. 882 (1982); *Castor*. Some of Sochor's claims on this issue merit no discussion;[8] however, others require inquiry.

We first examine Sochor's argument that the trial court committed fundamental error by failing to instruct the jury on voluntary intoxication as a defense to felony murder based on kidnapping. Voluntary intoxication is a defense to felony murder when the underlying felony is a specific-intent crime. *Linehan v. State*, 476 So.2d 1262 (Fla.

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[7] Sochor contends that the following were fundamental error: (1) prosecutorial comments on facts outside the evidence; (2) opinions of government witnesses as to Sochor's veracity and guilt; (3) a defense witness's statement on cross-examination that an individual from the prosecutor's office compared Sochor to Ted Bundy; (4) arguments by the state that Sochor's trial was the only time the state could try him for his crimes; (5) other evidence of Sochor's bad character, the victim's good character, beauty, and family; and (6) perjured testimony by a jailhouse informant as to whether he received leniency from the state in return for his testimony regarding Sochor's incriminating statements.

[8] We reject without discussion Sochor's claims that the trial court fundamentally erred by failing to properly instruct the jury as to: nondeath lesser-included offenses; manslaughter; third-degree murder; and kidnapping.

1985). Kidnapping is a specific-intent crime. *Heddleson v. State*, 512 So.2d 957 (Fla. 4th DCA 1987); *Mullin v. State*, 425 So.2d 219 (Fla. 2d DCA 1983); *see* § 787.01, Fla. Stat. (1989). Although the trial court instructed the jury that voluntary intoxication was a defense to premeditated murder, it did not so instruct the jury with regard to felony murder.

Fundamental error is error which goes to the foundation of the case. *Sanford v. Rubin*, 237 So.2d 134 (Fla. 1970). Failure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error. Voluntary intoxication is a defense to, but not an essential element of, kidnapping. Therefore, the state did not have to disprove voluntary intoxication in order to convict Sochor of felony murder based on the underlying felony of kidnapping. Because the complained-of instruction went to Sochor's defense and not to an essential element of the crime charged, an objection was necessary to preserve this issue on appeal. Moreover, there was sufficient evidence of attempted sexual battery, a general-intent crime to which voluntary intoxication is not a defense,[9] upon which to base a conviction of felony murder. Sochor's claim as to this point therefore fails.

We also address Sochor's argument that the trial court fundamentally erred by failing to instruct the jury on the statute of limitation as an absolute defense to felony murder and kidnapping. This, too, is a defensive matter that must be raised at trial. Had it been raised, the state could have shown that, even though Sochor was

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[9] Buford v. State, 492 So.2d 355 (Fla. 1986).

indicted for kidnapping beyond the applicable four-year limitation period, his undisputed, continuous absence from the state tolled the running of the statute. *See* § 775.15(6), Fla. Stat. (1989). Thus, the trial court did not commit fundamental error by failing to instruct the jury in this regard. In addition, capital crimes are not subject to a statute of limitation. § 775.15(1), Fla. Stat. (1989). Hence, Sochor's argument that his murder conviction must be overturned and remanded for a new trial because the limitation period had expired on several of the underlying felonies supporting a possible felony-murder theory is untenable.

Finally, we recently held that the failure to give the long-form excusable homicide instruction is not fundamental error. *State v. Smith*, 573 So.2d 306 (Fla. 1990). Sochor's claim as to this point thereby fails.

Our review of the record shows competent, substantial evidence to support Sochor's convictions of kidnapping and first-degree murder. We therefore affirm those convictions.

Turning to the penalty phase, Sochor's first claim is that the trial court improperly allowed the state to present and argue nonstatutory aggravating circumstances. To begin with, Sochor contends that the state introduced victim impact evidence in violation of *Booth v. Maryland*, 482 U.S. 496 (1987). Sochor's *Booth* claim is predicated upon prosecutorial comments and arguments to which no objection was made. To preserve a *Booth* issue an objection must be made. In our view, had there been an objection, it would not have been sustained. Thus, this issue is procedurally barred and lacks substance. *Parker v. Dugger*,

550 So.2d 459 (Fla. 1989); *Jackson v. Dugger*, 547 So.2d 1197 (Fla. 1989).

Sochor also contends that the state presented evidence of his lack of remorse, an improper aggravating circumstance. *Pope v. State*, 441 So.2d 1073 (Fla. 1983). After reviewing the record, we find that the prosecutor's comments during closing argument in their totality did not rise to such a level as to pinpoint lack of remorse or warrant a new sentencing trial. *See Bertolotti v. State*, 476 So.2d 130 (Fla. 1985).

Sochor further contends that the state introduced improper evidence of prior violent acts through the testimony of his ex-wife, Patricia Neal, and introduced improper hearsay testimony of, and his taped confession to, a rape in Michigan of which there was no conviction. In neither instance did Sochor's counsel object to the testimony, and these points are therefore procedurally barred. Moreover, Ms. Neal's testimony was introduced to rebut Sochor's defense that he became violent only after consuming alcohol; she testified to violent acts by Sochor when he was sober. The testimony regarding the Michigan rape was relevant to rebut the mitigating factor of no significant history of prior criminal activity. The playing of Sochor's taped confession during the penalty phase did not violate *Rhodes v. State*, 547 So.2d 1201 (Fla. 1989). Thus, we find no error in these claims. Lastly, Sochor's claim of error with regard to improper prosecutorial comments on this evidence during closing argument has no merit.

Sochor's next claim, regarding alleged errors in the penalty jury instructions, likewise must fail. None of the

complained-of jury instructions were objected to at trial, and, thus, they are not preserved for appeal. *Vaught v. State*, 410 So.2d 147 (Fla. 1982). In any event, Sochor's claims here have no merit.[10]

Sochor also claims that the prosecutor and trial court denigrated the jury's role in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate *Caldwell*. *Combs v. State*, 525 So.2d 853 (Fla. 1988); *Grossman v. State*, 525 So.2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989). Further, Sochor did not raise this claim at trial. Thus, it has not been preserved for review. *Combs; Jackson v. State*, 522 So.2d 802 (Fla.), *cert. denied*, 488 U.S. 871 (1988).

Turning to the actual sentence, Sochor claims that the evidence did not support three of the four aggravating

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[10] Sochor contends that the felony-murder instruction was inadequate because it did not define the underlying felony and did not inform the jury that this aggravating circumstance was only applicable to premeditated murder. We reject this claim because the court instructed the jury on the underlying felonies during the guilt phase and because this aggravating circumstance is applicable to both felony murder and premeditated murder. White v. State, 403 So.2d 331 (Fla. 1981), *cert. denied*, 463 U.S. 1229 (1983). We reject without discussion Sochor's other claims: that the instructions as to the aggravating factors of heinous, atrocious, or cruel and cold, calculated, and premeditated were improper; that the instructions as to statutory and nonstatutory mitigating evidence were improper; that the jury was improperly instructed as to the burden and standard of proof with regard to mitigating circumstances; and that Florida's sentencing scheme carries a presumption of death upon the finding of a single aggravating factor.

factors found by the trial court. He does not contest the finding of a previous conviction of a violent felony, and we find this aggravator supported by the record. Sochor does contest the finding that the murder was committed during a felony. We have already found sufficient evidence of both kidnapping and attempted sexual battery. Thus, the evidence supports this aggravating factor.

The evidence also supports finding that the murder was especially heinous, atrocious, or cruel. Fear and emotional strain can contribute to the heinousness of the murder. *Adams*, 412 So.2d at 857. Gary testified that the victim screamed for help after she was dragged from the truck and scratches on Sochor's face indicate that a struggle took place. The evidence supports the conclusion of horror and contemplation of serious injury or death by the victim. Moreover, Sochor confessed that he choked the victim to death. It can be inferred that "strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." *Tompkins v. State*, 502 So.2d 415, 421 (Fla. 1986) (citations omitted), *cert. denied*, 483 U.S. 1033 (1987). *Accord Johnson v. State*, 465 So.2d 499 (Fla.), *cert. denied*, 474 U.S. 865 (1985); *Doyle v. State*, 460 So.2d 353 (Fla. 1984). The trial court properly found this aggravating factor.

We disagree, however, that the murder was committed in a cold, calculated, and premeditated manner. Although there was sufficient evidence to support a premeditated murder conviction, this aggravator requires a "heightened" level of premeditation. *Hamblen v. State*, 527 So.2d 800 (Fla. 1988). The evidence introduced at trial

failed to demonstrate this requisite heightened level of premeditation. Rather, the killing most likely resulted from the victim's refusal to have consensual sex with Sochor and her resistance when he attempted to force himself upon her.

Sochor argues that the court should have found as mitigating factors that he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. In proof he relies on evidence of his alcohol use the night in question and on doctors' testimony that he was a dangerous and violent person when drinking. Sochor is an admitted rapist. As testified to by his ex-wife and the victim of a prior rape, when they declined to accede to Sochor's requests for sex he became violent. He himself explains that, when sexually aroused, an indescribable feeling comes over him in the form of an irresistible impulse, particularly when drinking. It is difficult to discern whether such conduct is mitigating, but the decision as to whether a particular mitigating circumstance is proven lies with the judge and jury. Reversal is not warranted simply because the appellant arrives at a different conclusion. *Stano v. State*, 460 So.2d 890 (Fla. 1984), *cert. denied*, 471 U.S. 1111 (1985). Although several doctors testified as to Sochor's mental instability, one testified that Sochor had not been truthful during testing and another testified that Sochor had "selective amnesia." While the sentencing order mentioned that Sochor had been found competent to stand trial and did not require Baker Act hospitalization, it is clear from the record that this is not the standard the

court used in sentencing Sochor. We see no reason to disturb the court's rejection of these mitigating factors.

Sochor also argues that the trial court failed to consider and improperly excluded nonstatutory mitigating evidence. The court in its sentencing order stated "[t]here were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory 'mitigating' circumstances." This testimony related Sochor's physical abuse by his father, his financial support of the family when his father was unable to work, his alcohol problems, and his violent temper and mental instability. The trial judge considered the evidence of family and personal history, but determined it was so insignificant that it had not been established as a mitigating circumstance. Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion. *King v. Dugger*, 555 So.2d 355 (Fla. 1990); *Scull v. State*, 533 So.2d 1137 (Fla. 1988), *cert. denied*, 490 U.S. 1037 (1989). We find no abuse of discretion in finding that the evidence did not rise to being a mitigating circumstance.

We also disagree with Sochor's claim that his death sentence is disproportionate. The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing. *Robinson v. State*, 574 So.2d

108 (Fla. 1991); *Holton v. State*, 573 So.2d 284 (Fla. 1990); *James v. State*, 453 So.2d 786 (Fla.), *cert. denied*, 469 U.S. 1098 (1984); *Francois v. State*, 407 So.2d 885 (Fla. 1981), *cert. denied*, 458 U.S. 1122 (1982). Under the circumstances of this case, and in comparison with other death cases, we find Sochor's sentence of death proportionate to his crime. *E.g., Hitchcock v. State*, no. 72,200 (Fla. Dec. 20, 1990); *Tompkins; Doyle*.

Finally, we have previously rejected claims that Florida's sentencing process is unconstitutional. *Young v. State*, no. 72,106 (Fla. Feb. 28, 1991); *Gunsby v. State*, 574 So.2d 1085 (Fla. 1991); *Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990).

We therefore affirm the convictions of kidnapping and first-degree murder and the death sentence.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, BARKETT, GRIMES and KOGAN, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

SUPREME COURT OF FLORIDA

TUESDAY, JUNE 18, 1991

DENNIS SOCHOR, Appellant,	*	CASE NO. 71,407
v.	*	Circuit Court No. 86-15270CF-10 (Broward)
STATE OF FLORIDA, Appellee.	*	

****

Appellant's Motion for Rehearing filed in the above cause is hereby denied.

SHAW, C.J., OVERTON, McDONALD, BARKETT, GRIMES and KOGAN, JJ., concur

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SUPREME COURT OF THE UNITED STATES

No. 91-5843

Dennis Sochor,

Petitioner

v.

Florida

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Florida.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Questions 2 and 4 presented by the petition.

November 18, 1991

Supreme Court, U.S.
FILED
JAN 13 1992
OFFICE OF THE CLERK

No. 91-5843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DENNIS SOCHOR,

Petitioner,

v.

FLORIDA,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the Florida Supreme Court's review of petitioner's death sentence violate the Eighth and Fourteenth Amendments where that court upheld the sentence even though the trial court had instructed the jury on, and had applied, an improper aggravating circumstance, where the Florida Supreme Court did not reweigh the evidence or conduct a harmless error analysis as to the effect of improper use of the circumstance on the jury's penalty verdict?

2. Did the application of Florida's "especially heinous, atrocious, or cruel" aggravating circumstance at bar violate the Eighth and Fourteenth Amendments?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-5843

DENNIS SOCHOR,

Petitioner,

v.

FLORIDA,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR PETITIONER

OPINION BELOW

The decision of the Supreme Court of Florida, JA 367, is reported at 580 So.2d 595.

JURISDICTION

The Florida Supreme Court entered its opinion on May 2, 1991, and denied a timely motion for rehearing on June 18, 1991. The petition for a writ of certiorari was filed on September 16, 1991, and was granted on November 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1257, Mr. Sochor having asserted in the state court below and asserting in this Court that

the State of Florida has deprived him of rights secured by the Constitution of the United States.

PROVISIONS OF LAW INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section One of the Fourteenth Amendment provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Section 921.141, Florida Statutes, which governs capital sentencing proceedings in Florida, is set out in Appendix A to this brief.

STATEMENT OF THE CASE

A jury in Broward County, Florida found Dennis Sochor guilty of first degree murder and kidnapping in the disappearance of Patricia Gifford. A day after finding Mr. Sochor guilty, and after hearing further evidence, argument, and instructions, the jury recommended by a vote of ten to two that he be sentenced to death for the murder. Finding four aggravating circumstances,[1] and "no mitigating circumstances to outweigh the aggravating circumstances," JA 353, the trial judge followed that recommendation, and also sentenced Mr. Sochor to life imprisonment for the kidnapping. On appeal, the Florida Supreme Court affirmed the convictions and sentences.

[1] That the murder was cold, calculated and premeditated; that it was especially heinous, atrocious or cruel; that Mr. Sochor had previously been convicted of a violent felony; and that the murder occurred during the course of a violent felony. JA 348-354.

A. Prior to trial, Mr. Sochor argued in a written motion that the "especially heinous, atrocious, or cruel" aggravating circumstance [2] was unconstitutional on three grounds: it could be applied to almost any capital felony; its application in practice indicated that reasonable and consistent application was impossible; and the circumstance was vague and overbroad and provided no basis for distinguishing its application to any particular factual situation. JA. 10. The court denied the motion without discussion. JA 19-26.

B. This cause arose from the disappearance and presumed death of Patricia Gifford on the night of December 31, 1981. The evidence as to what happened to her consisted almost entirely of accounts given by Dennis Sochor and his brother Gary, who was the state's main witness at trial. Ms. Gifford's body was never found.

The evidence at trial unequivocally showed that, on the evening of December 31, 1981, Patricia Gifford and a friend went to a bar in Broward County, Florida to celebrate New Year's Eve. At the bar, she conversed with Dennis Sochor, who had gone to the bar with Gary, who was vacationing from Michigan. Ms. Gifford's companion fell ill, and the Sochor brothers helped Ms. Gifford take her to her car. Ms. Gifford briefly returned to the bar and then went out to the parking lot to meet Dennis Sochor. She was never seen again.

The next day, her friend notified the police that she was missing, and an investigation turned up a photograph that someone had taken of her with Mr. Sochor at the bar. Publication of the photograph soon led to Gary Sochor, the only eyewitness to the offense. He returned to Florida from Michigan and tried to help find the body. At trial he gave this account:

When she came back out of the bar, Ms. Gifford agreed to join the men in getting something to eat, and the three

[2] § 921.141(5)(h), Fla.Stat.

set off in a truck driven by Dennis. Before entering the truck, Ms. Gifford and Dennis were kissing in the parking lot. JA 34-36. Gary's testimony on direct examination continued:

Q Did there come a time when the vehicle stopped?

A I remember the vehicle coming to a stop, and Denny got out of the truck and—

Q Now, do you remember a time when Patty said something to you?

A Patty was hollaring [sic] for help, asking what was going on.

Q Who was she yelling to help her?

A Myself. I got out of the passenger side, ran around the vehicle, and Denny had her on the ground, had her hands pinned down. I hollared [sic] at him, and—

Q What was she doing at that time, Patty?

A Just laying [sic] there, and I couldn't understand what was happening, and I just hollared [sic] at Denny to leave her alone. I went and picked up a stone, looking for a rock or stone or something, and I remember throwing—not to hit him. I threw the stone just above his head to scare him, and he turned and looked at me and told me to get back in the truck, which I did.

Q And why did you get back in the truck?

A Well, in our past, Denny would—we would get in brotherly arguments and fights, and sometimes Denny would get real furious and—

Q Let me ask you this: How did he look when you saw him out there? Describe him, if you would, to the ladies and gentlemen of the jury.

A I wouldn't know what came over him at times, but a couple of times in our past and at that particular time—

Q Do you need a drink of water, Gary?

A Some air.

MR. HANCOCK: Can we get a drink of water for him?

Q (By Mr. Hancock) Just relax.

A The pupil would roll back, and all I'd see is white in his eyes, and he'd be very—real furious, and in a voice that wasn't his. It would be deep, and would scare you.

Q And can you describe this look?

A He looked to be possessed.

Q What do you mean by "he looked to be possessed?

A Well, I don't know. It wasn't him. He was possessed by something, you know. I always looked at it as the devil.

Q Now, you indicated you had seen this look before; correct?

A Yes.

Q Now, after that, you indicated you got back in the truck; correct?

A Yes.

Q And after getting back in the truck, can you tell the ladies and gentlemen of the jury what you did?

A I put my face in my mands, in my lap, and just sat there.

Q And how long was it before Dennis came back into the truck?

A It seemed to be around five minutes, a couple of minutes, not very long.

Q Did you ever see Patty again?

A No.

Q And what happened after he got back in the truck?

A As we started down the road—and it's not hard to remember, but it's just I can remember him starting to talk to me, and I started screaming because I didn't want to hear anything he had to say. I didn't look at him. I didn't sit up. I was just screaming.

Q And why didn't you make any effort to help Patty?

A I was scared of him. We got in some fights in our past, and I usually ended up on the short end of the deal.

Q And after you got back in, did he say anything to you about telling anyone?

A All I remember is the screaming, just screaming, not saying anything, just screaming, and all I remember him saying was that if I didn't shut up, I'd never see my family again.

Q When he gave that threat to you, what did you say or do?

A The next thing I remember, I stopped screaming, and I sat straight up in the truck, and I seen the stoplight, and it was like I didn't remember a thing. I mean I asked him to take me to the beach.

Q And did there come a time when he went back to his place?

A All I remember now is arguing with him about taking me to the beach.

Q Did you get back to the apartment, to where he was living?

A Yeah, he wouldn't take me to the beach, and we got back to the apartment, and I remember getting out and still arguing about I wanted to go down to the beach, and I can remember somebody at the other apartment hollaring [sic] at us to quiet down.

JA 37-40.

Meanwhile, after seeing his picture in the newspaper, Dennis Sochor had fled the area, but was eventually arrested in Georgia in 1986 for a traffic offense. Capt. Mark Schlein and Sgt. Paul Luria of the Broward County Sheriff's Office conducted a taped interview of him in Georgia. The discussion concerned uncontrollable urges that would come over him, after which he could not recall what he had done. He said that on the morning of January 1, 1982, he again had the feeling that he had done something terrible the night before, that he had raped another woman. JA 120. There were scratches on his face,[3] and his brother told him that a woman's shoes and purse were in the truck. JA 120-21. He had been quite drunk the night before, and remembered driving his brother home. JA 116-18. He remembered that a woman had refused to have sex. JA 120. When he saw his picture in the newspaper, he did not recall what had happened, but he thought he had committed another rape, and left the area. JA 122-23. Although he did not know what caused these uncontrollable feelings, he said they are more prevalent when he had been drinking. JA 124-25.

The officers took Mr. Sochor back to Broward County, and then to the bar's parking lot. According to Capt. Schlein, Mr. Sochor became "very emotional," and said that he had choked and killed the woman. JA 131-32. The officers took another taped statement which again contained discussion of the uncontrollable urges that take over Mr. Sochor and his remorse, but which also furnished these details:

> Q Just listen to me. You were sitting in the truck, and she was sitting in the truck. Could you tell me what you said to her at that point?
>
> A I remember we kissed a few times, and I just started getting stimulated.

---

[3] Other witnesses confirmed seeing scratches on his face.

Q What did you feel like?

A Like having sex.

Q Have you felt that way before?

A Yes.

Q And when you felt that way before with a girl, what happened?

A Well, not everytime [sic], but some uncontrollable feeling took over.

Q What happened next?

A There was an argument.

Q About what?

A Having sex.

Q Did you ask her—did you want sex?

A Yes.

Q Well, what was she saying?

A No.

Q Describe what happened next.

A And I grabbed her.

Q Tell me what happened.

A And then she hit me and—

Q Where did you grab her?

A I'm not sure, the hair or something. I don't know.

Q What was she doing?

A She started hitting me and—

Q What else was she doing?

A And started screaming.

Q Go on.

A I panicked, and I think she scratched me and—

Q What happened after she was hitting you and scratching you, go on. What happened next? What did you do?

A I think I got angry and began choking her.

Q While you were choking her, what was she doing?

A Fighting.

Q Go on.

A And then she didn't move.

Q What happened next?

A Then I didn't see her move, and I got scared.

Q What were you scared of?

A Of what had just happened.

Q What did you think had just happened? What did you just do?

A I probably just murdered her.

Q When you looked at her, was she breathing?

A No.

Q What were you thinking?

A I just killed her.

JA 138-40. He then drove off, ultimately leaving the body covered by a blanket near some bushes. JA 141. He did not have sex with the body. *Id.*

Mr. Sochor unsuccessfully tried to help the police find the body. JA 146. He then made another statement, which was largely concerned with questioning about where he had left the body (he was unsure), but also contained an account similar to the foregoing, in which he said that Gary was not present when he was with the woman, JA 162-63, and (this is less clear) that he killed her inside the truck. JA 163.

Several mental health experts testified about Mr. Sochor's mental state at the time of the offense, basing

their testimony on examinations occurring after his 1986 arrest. The presentation of their testimony was somewhat confused. Defense counsel had not talked to the two defense experts (Drs. Zager and Ceros-Livingston) before calling them to the stand (in fact, he was unaware of the field of expertise of one of them, R 693-94). Dr. Zager testified that Mr. Sochor could be extremely dangerous and was legally sane at the time of the offense. R 657-58. Dr. Ceros-Livingston also testified that Mr. Sochor was legally sane at the time of the offense and that he showed a "fake-bad" profile when tested. R 714. On cross-examination, the prosecutor showed that these witnesses knew almost nothing about the facts of the case except for half-remembered newspaper accounts.[4] They apparently knew nothing of Gary's version of the crime. Dr. Castillo, called by the state in rebuttal, testified that Mr. Sochor had "a type of selective amnesia" about the facts of the incident. R 798. Again, the doctor's information about the facts of the case consisted of newspaper accounts. R 797. These witnesses agreed that Mr. Sochor did not meet the criteria for involuntary hospitalization of mentally incompetent persons under Florida's "Baker Act" (sections 394.451 through 394.4789, Florida Statutes), but was an alcoholic and had abused drugs, and had mental problems.

Paul Jones, who had lived with Mr. Sochor in Georgia, testified that Mr. Sochor had told him that he had choked someone and had put the body in a drainage pipe, and that it would not bother him to do it again. R 564. Michael Hickey, a jail inmate, said that Mr. Sochor told him that he had killed a "fucking, slut, bitch" while his brother was hitting him. R 579-80.

C. At sentencing, the state presented testimony regarding previous brutal sexual assaults committed by Mr.

[4] R 662-687 (testimony of Dr. Zager); R 721 (testimony of Dr. Ceros-Livingston)

Sochor in Florida and Michigan, JA 217-26, 230-35, and testimony from his former wife regarding violent sexual acts that he had committed against her. JA 197-200. It was her opinion that Mr. Sochor's behavior was erie and crazy, and could be characterized as psychotic. JA 207. She also testified that Mr. Sochor had stolen purses from prostitutes while stationed in Italy as a paratrooper. JA 208-209.

Ronald Wright, a pathologist, testified that strangulation is a slow death "relatively speaking." JA 211. He also said that it can be a very quick death without pain, JA 215-16, and that the person can die within 13 seconds if short of breath at the time of the strangulation. JA 214-15.

Mr. Sochor presented evidence from family members detailing extensive and brutal physical abuse of Dennis by his father during his childhood, showing that Dennis had been placed in a mental hospital in the past, that he could go beserk under the influence of alcohol, and that his mother abused him as a child. JA 242-48, 256-64, 268-78, 290-94.

The written reports of the mental health experts who testified at trial were placed into evidence, JA 194, but it is not clear whether the jury reviewed them. They did not purport to address statutory or nonstatutory mitigating circumstances.

D. At sentencing, the prosecutor argued to the jury that the murder of Ms. Gifford was cold, calculated, and premeditated,[5] JA 306, and the trial court instructed the jury on that aggravating circumstance. JA 326-27. In its sentencing order, the trial court found that the facts supported the circumstance. JA 350-51. On appeal, the Florida Supreme Court struck the circumstance:

[5] Under section 921.141(5)(i), Florida Statutes, the jury and judge in a capital sentencing proceeding may consider in aggravation that the murder "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification."

> We disagree, however, that the murder was committed in a cold, calculated, and premeditated manner. Although there was sufficient evidence to suport a premeditated murder conviction, this aggravator requires a "heightened" level of premeditation. *Hamblen v. State*, 527 So.2d 800 (Fla.1988). The evidence introduced at trial failed to demonstrate this requisite heightened level of premeditation. Rather, the killing most likely resulted from the victim's refusal to have consensual sex with Sochor and her resistance when he attempted to force himself upon her.

JA 379-80; 580 So.2d at 603. Nevertheless, the court upheld the death sentence, writing at page 604 (JA 381):

> The trial court carefully weighed the the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing.

E. The prosecutor also argued to the jury at sentencing that the murder was "especially heinous, atrocious, or cruel,"[6] JA 305-306, 311-12, and the court instructed the jury as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.
>
> . . . .
>
> . . . and number three, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. . . .

JA 326. The trial court used the circumstance in sentencing Mr. Sochor:

[6] § 921.141(5)(h), Fla.Stat.

> The Court finds, according to Florida Statutes 921.141 (5)(h), that the capital felony was especially heinous, atrocious or cruel. The evidence indicated that the victim was forcibly removed from the truck while she pleaded for help and even begged for her life. Even though Patricia Gifford's body was never recovered and no one knows how badly she was beaten, the Defendant admitted in his statements that as he choked her she resisted and fought him. There were several fingernail marks on his face which substantiates that violent struggle ensued as confirmed by the Defendant's statements to the police officer. Dr. Wright testified that asphyxiation is a slow and painful death. Fear and emotional trauma preceding the victim's death may be considered as contributing to the heinous nature of the capital felony. It is clear there was fear and definitely emotional trauma before her death.

JA 350. Affirming, the supreme court wrote:

> The evidence also supports finding that the murder was especially heinous, atrocious, or cruel. Fear and emotional strain can contribute to the heinousness of the murder. *Adams*, 412 So.2d at 857. Gary testified that the victim screamed for help after she was dragged from the truck and scratches on Sochor's face indicate that a struggle took place. The evidence supports the conclusion of horror and contemplation of serious injury or death by the victim. Moreover, Sochor confessed that he choked the victim to death. It can be inferred that "strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." *Tompkins v. State*, 502 So.2d 415, 421 (Fla.1986) (citations omitted), *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277, 91 L.Ed.2d 781 (1987). *Accord Johnson v. State*, 465 So.2d 499 (Fla.), *cert. denied*, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); *Doyle v. State*, 460 So.2d 353

(Fla.1984). The trial court properly found this aggravating factor.

JA 379.

F. In his sentencing order, the trial judge wrote regarding the statutory mitigating circumstance of extreme mental or emotional disturbance: [7]

> This mitigating circumstance does not apply. The doctors who testified all found the Defendant competent and that he did not meet the criteria for involuntary hospitalization pursuant to the Baker Act. However, he was diagnosed as extremely dangerous and violent. Even though the Defendant claimed to the doctors he could not remember what happened, the Court finds as Dr. Castillo testified that the Defendant suffered from "selective amnesia" and attempted to mislead the doctors as to his recollection of the murderous incident.

JA 351. Regarding the statutory mitigating circumstance of substantial impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law,[8] he wrote:

> This mitigating circumstance does not apply. All the credible evidence indicates that the Defendant was able to appreciate the criminality of his conduct and was able to conform his conduct to the requirements of law if he so desired. He told a witness who testified during the trial, that he had choked someone in Fort Lauderdale, Florida and it was so easy that he could do it again. Even though the Defendant maintained he was intoxicated during the crime, the testimony from all the witnesses showed, though he may have had some alcoholic drinks, he was still in control of his actions and behavior and knew what was happening. His ex wife testified that he acted violently even when he was not under the influence of alcohol.

[7] § 921.141(6)(b), Fla.Stat.

[8] § 921.141(6)(f), Fla.Stat.

JA 352-53. Regarding nonstatutory mitigation, he wrote:

> 8. Any other aspect of the Defendant's character or record and any other circumstance of the offense. There were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory "mitigating" circumstances.

JA 353. He then concluded on the same page:

> In Summary, it is the conclusion of the Court, after conscientiously weighing the aggravating and mitigating circumstances, that there are sufficient aggravating and mitigating circumstances to justify and warrant the imposition of the death penalty and that there are no mitigating circumstances to outweigh the aggravating circumstances.

In affirming, the supreme court wrote:

> Sochor argues that the court should have found as mitigating factors that he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. In proof he relies on evidence of his alcohol use the night in question and on doctors' testimony that he was a dangerous and violent person when drinking. Sochor is an admitted rapist. As testified to by his ex-wife and the victim of a prior rape, when they declined to accede to Sochor's requests for sex he became violent. He himself explains that, when sexually aroused, an indescribable feeling comes over him in the form of an irresistible impulse particularly when drinking. It is difficult to discern whether such conduct is mitigating, but the decision as to whether a particular mitigating circumstance is proven lies with the judge and jury. Reversal is not warranted simply because the appellant arrives at a different conclusion. *Stano v. State*, 560 So.2d 890 (Fla.1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

Although several doctors testified as to Sochor's mental instability, one testified that Sochor had not been truthful during testing and another testified that Sochor had "selective amnesia." While the sentencing order mentioned that Sochor had been found competent to stand trial and did not require Baker Act hospitalization, it is clear from the record that this is not the standard the court used in sentencing Sochor. We see no reason to disturb the court's rejection of these mitigating factors.

Sochor also argues that the trial court failed to consider and improperly excluded nonstatutory mitigating evidence. The court in its sentencing order stated "[t]here were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory 'mitigating' circumstances." This testimony related Sochor's physical abuse by his father, his financial support of the family when his father was unable to work, his alcohol problems, and his violent temper and mental instability. The trial judge considered the evidence of family and personal history, but determined it was so insignificant that it had not been established as a mitigating circumstance. Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion. *King v. Dugger*, 555 So.2d 355 (Fla.1990); *Scull v. State*, 533 So.2d 1137 (Fla. 1988), *cert. denied*, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989). We find no abuse of discretion in finding that the evidence did not rise to being a mitigating circumstance.

JA 380-81; 580 So.2d at 603-604.

SUMMARY OF ARGUMENT

1. The Florida Supreme Court violated the teachings of *Parker v. Dugger*, 111 S.Ct. 731 (1991) and *Clemons v. Mississippi*, 110 U.S. 1441 (1990) in affirming Mr. Sochor's death sentence. *Parker* and *Clemons* teach that,

when a state appellate court has struck an aggravating circumstance relied on in sentencing a person to death, it may not affirm the sentence unless it either conducts an independent reweighing of the remaining evidence or conducts harmless error analysis. *Parker*, 111 S.Ct. at 738. While *Parker* involved a life recommendation from the jury, and the present case involves a death recommendation, *Parker* still controls because the jury was urged to consider, and was instructed on, the improper circumstance, and the trial court relied on the circumstance in sentencing Mr. Sochor.

The Florida Supreme Court has repeatedly asserted that it does not reweigh evidence, and it did not do so here. Instead, it deferred to the trial court's findings in its sentencing order. It also did not conduct a proper harmless error analysis, because it did not carefully examine the evidence presented to the jury to determine beyond a reasonable doubt that, without the circumstance, Mr. Sochor would still have been sentenced to death.

Since the court neither reweighed nor conducted a proper harmless error analysis, its decision should be reversed.

2. The state courts' application of the "especially heinous, atrocious, or cruel" aggravating circumstance rendered Mr. Sochor's death sentence unconstitutional. The instruction used at bar violated the Eighth Amendment under the teachings of *Maynard v. Cartwright*, 486 U.S. 352 (1988), so that remand is required under *Shell v. Mississippi*, 111 S.Ct. 313 (1990) if Florida is treated as a jury sentencing state. If Florida is treated as a judge sentencing state, remand is required under *Walton v. Arizona*, 110 S.Ct. 3047 (1990) because Florida's use of the sentencing circumstance has long deviated from the narrow construction approved in *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion), the trial court did not employ the *Proffitt* construction, and the supreme court did not make its own determination of the circum-

stance and did not conduct a harmless error analysis. Further, the application of the circumstance over the years has been so standardless and erratic that the circumstance is itself unconstitutional under *Proffitt* and *Maynard*.

ARGUMENT

I. INADEQUACY OF APPELLATE REVIEW

A. In *Parker v. State*, 458 So.2d 750, *cert. denied*, 470 U.S. 1088 (1985), the Florida Supreme Court struck two of the six aggravating circumstances on which the trial court had relied in imposing a death sentence, but upheld the sentence where the trial court had written in its sentencing order that it had found no mitigating circumstances that outweighed the aggravating circumstances. The case came before the Court on certiorari review of the Eleventh Circuit's reversal of habeas corpus relief. 111 S.Ct. 731. Noting that the state supreme court did not independently reweigh the evidence, but may have concluded a harmless error analysis, the Court concluded that Mr. Parker's death sentence was illegal because the state supreme court had not taken into account the mitigating evidence and factors considered and weighed by the trial court.

Because Florida is a "weighing state," in which the sentence is determined on the basis of a particularized balance of aggravating and mitigating factors,[9] the striking of two of the aggravating circumstances by the Florida Supreme Court altered the balance involved in making an " '*individualized* determination on the basis of the character of the individual and the circumstances of the crime.' " 111 S.Ct. at 739 (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983); emphasis in *Zant*). By affirming the sentence without a new, individualized determination taking mitigating and aggravating factors into account, the supreme court deprived Mr. Parker of a forum in which his mitigating evidence was considered and

[9] § 921.141(2), Fla.Stat.

given effect as a counterweight to the remaining aggravating circumstances, in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978); *Penry v. Lynaugh*, 492 U.S. 302 (1989); and *Clemons*, 110 S.Ct. at 1450 ("An automatic rule of affirmance in a weighing State would be invalid . . . , for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances."). Thus the affirmance of the death sentence "deprived Parker of the individualized treatment to which he was entitled under the Constitution." 111 S.Ct. at 740.

Parker followed *Clemons*, which approved two distinct procedures by which a state appellate court can affirm a death sentence even after striking one or more aggravating circumstances used in the trial court: the state court can independently reweigh the mix of mitigating factors and aggravating circumstances, or it can find the error was harmless. *Parker*, 111 S.Ct. at 738; *Clemons*, 110 S.Ct. at 1451.

B. The first question for decision here is whether *Parker*'s holdings that meaningful appellate review plays "a crucial role . . . in the ensuring that the death penalty is not imposed arbitrarily or irrationally," 111 S.Ct. at 739, and that "meaningful appellate review requires that the appellate court consider the defendant's actual record," *id.*, are inapplicable here because Mr. Sochor's jury, unlike Mr. Parker's, recommended a death sentence. Such a distinction is without a constitutional difference. Although *Parker* recognized the prominent place of the *Tedder*[10] rule in Florida's jurisprudence, and although *Tedder* is of great importance for many issues, including the harmless error issue discussed below, the Court's only reference to *Tedder* in connection with the present issue

[10] *Tedder v. State*, 322 So.2d 908 (Fla.1975) (judge may override life verdict only where virtually no reasonable person could differ with death sentence).

was as one of the bases for concluding factually that the *Parker* judge must have found some nonstatutory mitigating evidence. 111 S.Ct. at 737. None of the constitutional reasoning that required appellate reweighing or harmless error analysis when aggravating circumstances are stricken on appeal turned on the fact that the Parker jury had recommended a life sentence.[11] And the fact that Mr. Sochor's jury recommended death does not abate the need for meaningful appellate review.[12] The legally insupportable "premeditation" circumstance was submitted to Mr. Sochor's jury as well as found by his trial judge; whether it affected the jury's verdict is unknowable because Florida juries make no specific factual findings of aggravation or mitigation, and the verdict reflects only a weighing of the relative "sufficiencies" of aggravating and mitigating circumstances. *See Parker*, 111 S.Ct. at 735. For the same reason, we do not know whether the jury found any mitigation to weigh against the aggravation at bar. Thus in light of the Florida Supreme Court's striking of the "premeditation" circumstance, the jury's verdict provides no better assurance than the trial judge's findings that the mitigating evidence could not have outweighed the aggravating circumstances without the struck circumstance.[13]

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[11] Because Mr. Parker's jury had recommended a life sentence, this Court did not have to consider the effect of the error on the verdict in his case. But here, the death sentence rested on the jury's death recommendation. The appellate review in a death recommendation case must go to the effect of error on the jury verdict in order to address its effect on the resulting sentencing order.

[12] The Court recognized the need for full appellate review in Florida in *Proffitt*, a case involving a jury death recommendation.

[13] In striking the "premeditation" circumstance without substantial discussion, the supreme court did not address Mr. Sochor's constitutional arguments regarding the circumstance. He had argued at pages 96-97 and 111-12 of his initial brief that both the circumstance and its jury instruction violated the teachings of *Maynard*. Had the court upheld the application of the circumstance at bar, its use would have been unconstitutional: the Florida Supreme Court has written that the circumstance is unconstitutional without a limiting construction. *Porter v. State*, 564 So.2d 1060, 1063-64 (Fla. 1990) (discussing limiting construction put on circumstance by *Rogers v. State*, 511 So.2d 526 (Fla.1984)). The jury instruction used at bar makes no mention of the *Rogers/Porter* limitation, which no doubt led to the misapplication of the circumstance at bar. As to some problems with the circumstance, *see* Kennedy, *Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases*, 17 STETSON L. REV. 47 (1987).

C. Thus we come to the central question: did the Florida Supreme Court conduct either an independent reweighing or a harmless error analysis as required by *Parker* and *Clemons*?

i. *Reweighing.* "[T]he Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances." *Parker*, 111 S.Ct. 738 (citing cases). The state court has held that it complies with *Clemons* by the second alternative, harmless error analysis. *White v. Dugger*, 565 So.2d 700, 702 (Fla.1990), *Preston v. State*, 564 So.2d 120, 122-23 (Fla.1990).[14] *Parker's* view of Florida law on this point is correct.

At bar, the court followed its practice and did not reweigh, deferring to the trial court's judgment finding and weighing mitigation and aggravation. As to statutory

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[14] Although the court may have sometimes conducted reweighing prior to 1981, *see Goode v. State*, 365 So.2d 381 (Fla.1978), it disavowed any independent reweighing in *Brown v. Wainwright*, 392 So.2d 1327, 1331 (Fla.1981), and has never looked back. It has also made clear that its proportionality review does not involve reweighing. *Fitzpatrick v. State*, 527 So.2d 809, 812 (Fla.1988). The court sees itself as "a reviewing court, not a fact-finding court," so that it defers to the findings of the trial court. *Lucas v. State*, 568 So.2d 18, 23 (Fla.1990). *Lucas* also made clear that proportionality review does not involve determination of whether the death penalty is necessarily the correct sentence: "On the facts of this case we do not agree that death is necessarily disproportionate for this killing. We cannot say, however, whether the court properly found it to be appropriate."

mental mitigating circumstances, the supreme court wrote that "the decision as to whether a particular mitigating circumstance is proven lies with the judge and jury. . . . We see no reason to disturb the court's rejection of these mitigating factors." JA 380; 580 So.2d at 604. As to Mr. Sochor's troubled and difficult childhood: "Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion." JA 381; 580 So.2d at 604.[15] The court did not even consider such other mitigating matters as the nonstatutory mitigating effect of the overwhelming evidence of Mr. Sochor's deranged state at the time of the crime,[16] and made no mention of his repeated expressions of remorse in his statements to the police,[17] or of his attempts to help locate the body. Further, the court deferred to the trial court's finding of the heinousness circumstance,[18] and did not consider what weight to give it:

[15] In other cases, the court has held that such evidence is mitigating as a matter of law. *See Campbell v. State*, 571 So.2d 415 (Fla.1990), and *Nibert v. State*, 574 So.2d 1059 (Fla.1990).

[16] *See Perry v. State*, 522 So.2d 817 (Fla.1988) ("psychological stress" as nonstatutory mitigation); *Cheshire v. State*, 568 So.2d 908 (Fla.1990) ("any emotional disturbance relevant to the crime").

[17] R 481 ("Q Do you feel sorry for what you have done? A Yes, tremendously sorry."), 486-87 ("I would say if God could give me the power to bring her back, I would, or if I could take my life in place of hers, I would. That—I don't know if it were my daughter, how could forgive a person . . . I'm so deeply sorry, somehow that just isn't enough. I can never cry enough tears for the hurt and pain I have caused."), 504 ("I believe I started crying on my way home."), 505 (he felt "terrified, shocked" at what he had done), 506 ("I am so sorry. This is the hardest think I've ever had to live with in my life."), 530 ("I cried many nights wondering what I had done"), 531 ("I feel like I finally am owing up to something that needed to be paid up a long time ago"), 532 ("I am deeply sorry for having hurt Patty, and I am deeply sorry for all the time and trouble I have caused everyone"). As to the mitigating effect of such remorse *see Songer v. State*, 544 So.2d 1010 (Fla.1989).

[18] The court uses a deferential abuse of discretion standard in reviewing findings of aggravating circumstances. *Gaskin v. State*, 16 Fla. L. Week. S762, S763 (Fla. Dec. 5, 1991).

it did not purport to determine how the circumstances weighed out in light of the state's evidence that Mr. Sochor acted in an irrational frenzy.[19]

This deference involved more than acceptance of the trial court's very limited findings of historical fact. It involved a refusal to consider potentially mitigating evidence (which the jury may have accepted) on the ground that the trial court had made the determination that such evidence was not mitigating even if factually uncontested. Yet the supreme court has itself noted that a Florida trial judge's conclusory finding such as the one to which it here deferred ("'after considering [the mitigating] testimony, this Court finds no nonstatutory "mitigating" circumstances'") may mean any of several different things: "(1) that the evidence urged in mitigation was not factually supported in the record; (2) that the facts, even if established in the record, had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved." *Rogers*, 511 So.2d at 534. Without attempting to disentangle these several possible meanings of the trial court's limited rejection of nonstatutory mitigation,[20] the court

[19] The heinousness circumstance can be given lesser weight where the defendant acted in an irrational frenzy. *Amazon v. State*, 487 So.2d 8, 13 (Fla.1986). *See also Mann v. State*, 420 So.2d 578, 581 (Fla.1982) ("There is frequently a significant connection between the grossness of a homicide and the perpetrator's mental condition.").

[20] The finding of no mitigation at bar seems to fall into the third category. The state's evidence, by which it is bound under state law, *Davis v. State*, 90 So.2d 629, 632 (Fla.1956), *D.J.G. v. State*, 524 So.2d 1024 (Fla.App.1987), was that Mr. Sochor was under the influence of some sort of mental disturbance at the time of the killing. The evidence regarding Mr. Sochor's upbringing, being unrebutted, had also to be taken as mitigating under *Rogers*, and *Campbell*. *See also Banda v. State*, 536 So.2d 221, 224-25 (Fla.1988) ("we have held that a "pretense of moral or legal justification existed where the defendant consistently had made statements that he had killed

simply acceded to it, writing that "[e]ven after removing the aggravating factor of cold, calculated and premeditated there still remain three aggravating factors to be weighed against *no mitigating circumstances*," JA 381; 580 So.2d at 604 (emphasis added) and that "[t]he trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted." *Id.* This limited appellate review falls short of the independent reweighing of the evidence of sentencing circumstances contemplated in *Clemons* and *Parker*.

ii. *Harmless error review.* As already noted, Florida's chosen response to *Clemons* is harmless error review. The complete harmless error review below was:

> The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing. [Cit.] Under the circumstances of this case, and in comparison with other death cases, we find Sochor's sentence of death proportionate to his crime.

JA 381-82; 580 So.2d at 604. This discussion differs little from what the state court said in *Clemons v. State*, 535 So.2d 1354, 1364-65 (Miss. 1988) (indicating that, even with one aggravating circumstance struck, remaining circumstance will support the death penalty, and ruling that death sentence was not disproportionate). Like the Mississippi court's pronouncements, the Florida court's first three sentences "can be read as a rule authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance," *Clemons v. Mississippi*, 110 S.Ct. at 1450, while the last sentence (apparently addressed to the separate issue of statutory proportionality review), adds nothing but the kind of ambiguity also found in *Clemons*. 110 S.Ct. at 1451.

Further, under the teachings of *Yates v. Evatt*, 111 S.Ct. 1884 (1991), a finding of harmless error could not be made on this record without a more searching consideration of mitigating evidence. The "premeditation" circumstance was improperly submitted to the jury, which returned a death verdict that heavily influenced Mr. Sochor's sentence. Although the trial judge later found no mitigating circumstances to outweigh the aggravating circumstances and the Florida Supreme Court deferred to this finding, there is no way to know that the jury did not find mitigating circumstances sufficient to call for a life sentence when not weighed against the improper circumstance. And if the jury rendered a life verdict, there can be no doubt that the amount and kind of mitigation revealed by this record would have caused the supreme court to order a life sentence, no matter what the trial judge found or did.

"[I]t is the jury's function, in the first instance, to determine the validity and weight of the evidence presented

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the victim only after the victim jumped at him and where no other evidence existed to disprove this claim. [Cit.] We reached this conclusion even though the accused himself, an obviously interested party, was the only source of this testimony."). The only discretion the trial court had was to determine the weight to assign to the evidence. *Campbell, Rogers, Wickham v. State*, 16 Fla. L. Week, S777, S777-78 (Fla. Dec. 12, 1991). By way of contrast, had the trial court considered the evidence of Mr. Sochor's remorse (which it did not directly address), it might have been free to reject it on the ground that it was somewhat rebutted by other evidence in the case.

Factual findings of no mitigation in Florida are less determinations of historical than judgment calls that can be discarded even where the underlying facts do not change. Thus in *King v. Dugger*, 555 So.2d 355 (Fla.1990), the court upheld a resentencing court's finding that the defendant's age at the time of the offense was not mitigating ever though the original court had found that mitigating circumstance, although the underlying fact obviously had not changed.

in aggravation and mitigation." *Holsworth v. State*, 522 So.2d 348, 354 (Fla. 1988).

Although the ultimate sentencing decision is the judge's, that decision is almost dictated by the penalty verdict: where there is a life verdict, the judge can impose a death sentence only where no reasonable person could agree with the verdict. *Tedder*. The great majority of life verdicts result in life sentences, and the few override sentences are almost always reversed: from 1986 through 1990, the court affirmed only two override sentences;[21] in 1990, the court reversed every override death sentence to come before it on direct review;[22] and in 1991 it has affirmed only one.[23] A life verdict mandates a life sentence except in the most extreme cases.[24]

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[21] Mello, *The Jurisdiction to do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U.L. REV. 923, 937 (1991). In 1984 and 1985, the court affirmed most of the override sentences to come before it, *id.*, but it has since determined that its practice during that period was incorrect. *Cochran v. State*, 547 So.2d 928, 933 (Fla.1989).

[22] *Morris v. State*, 557 So.2d 27 (Fla.1990); *Hallman v. State*, 560 So.2d 223 (Fla.1990); *Cheshire; Carter v. State*, 560 So.2d 1166 (Fla.1990); *Buford v. State*, 570 So.2d 923 (Fla.1990); and *Hegwood v. State*, 575 So.2d 170 (Fla.1990).

[23] *Zeigler v. State*, 580 So.2d 127 (Fla.1991) (defendant killed a series of persons as part of elaborate plan to obtain insurance proceeds). The court reversed override sentences in the following cases: *Bedford v. State*, 16 Fla. L. Week. S665 (Fla. Oct. 10, 1991); *Cooper v. State*, 581 So.2d 49 (Fla.1991); *Craig v. State*, 585 So.2d 278 (Fla.1991); *Dolinsky v. State*, 576 So.2d 271 (Fla.1991); *Douglas v. State*, 575 So.2d 165 (Fla.1991); *Downs v. State*, 574 So.2d 1095 (Fla.1991); *McCrae v. State*, 582 So.2d 613 (Fla.1991); *Savage v. State*, 16 Fla. L. Week, S647 (Fla, Oct. 3, 1991); and *Wright v. State*, 586 So.2d 1024 (Fla.1991).

[24] By the same token, the judge is generally supposed to follow a jury's death recommendation. *Grossman v. State*, 525 So.2d 833, 839, n. 1 (Fla.1989) ("a jury recommendation of death should be given great weight"); *Chambers v. State*, 339 So.2d 204, 208 (Fla. 1976) (England, J., concurring) ("Where a jury and a trial judge

This Court recognized the great importance of the jury's role in Florida capital sentencing proceedings in *Hitchcock v. Dugger* 481 U.S. 393 (1987), finding an Eighth Amendment violation where both the judge and the jury were limited in their consideration of mitigating evidence. If anything, subsequent case law strengthens the importance of the penalty verdict.

The effect of a life verdict is such that the trial court cannot override it even when presented an additional aggravating circumstance not available to the jury. *Cochran* (trial court used subsequent first degree murder conviction, of which jury was unaware, to override life verdict; reversing, supreme court wrote that existence of additional circumstance did not make the jury's life verdict so unreasonable as to justify the override).[25]

Where the jury has rendered a reasonable life verdict, the Double Jeopardy Clause of the Florida Constitution forbids the state from seeking a death sentence at a retrial, even though the trial court imposed a death sentence at the first trial. *Wright*, 586 So.2d at 1032.

The nature of supreme court review depends almost entirely on the penalty verdict. When the jury has returned a life verdict, the supreme court ignores a trial court finding of little or no mitigation, and scrutinizes the record for mitigation that the jury may have found.[26] Thus

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reach contrary conclusions . . . the jury recommendation should be followed"); *LeDuc v. State*, 365 So.2d 149, 151 (Fla.1978) (death recommendation "should not be disturbed . . . unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation").

[25] Similarly, in *Buford*, *Douglas*, and *McCrae*, the court held that, on resentencing, the trial court could not override life verdicts rendered ten or more years previously, even where the evidence at resentencing was quite different from the evidence at the original sentencing.

[26] A life verdict also affects supreme court review in another fundamental way. Where there has been a death verdict, the court

in *Carter v. State*, 560 So.2d 1166, the court reduced a death sentence to one of life imprisonment even though the trial court had found five aggravating circumstances and no mitigating circumstances. In reaching this conclusion, the court combed the record for mitigating factors rejected by the judge but which the jury may have found.[27] *See also, e.g., Christian v. State*, 550 So.2d 450 (Fla. 1989) (defendant repeatedly stabbed handcuffed fellow inmate and threw him off balcony; trial court found four aggravating circumstances, no mitigating); *Cheshire* (trial court found three aggravating circumstances, no mitigation); *Downs*, 574 So.2d 1095 (trial court found four aggravating circumstances and no mitigation); *Hegwood* (triple homicide; trial court found six aggravating circumstances and one mitigating); *Dolinsky* (trial court found three aggravating circumstances and no mitigation).

In *Cooper v. State*, 581 So.2d 49, the court reversed an override sentence where the trial court found four aggravating circumstances and two nonstatutory mitigating circumstances. The supreme court held that the trial court could not make its own independent determination as to whether Mr. Cooper or his co-defendant was the killer: "The trial court's finding Cooper to have been the actual killer may have been a substitution of the court's judgment for that of the jury." *Id.* at 51, n.[28]

Had the jury returned a life verdict at bar, the court would have engaged in a similar search of the record of

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looks only to other death verdict cases in conducting its proportionality review. *Hitchcock v. State*, 578 So.2d 685 (Fla.1990). *See also Stone v. State*, 378 So.2d 765, 772 (Fla.1975).

[27] Chronic alcohol and drug abuse, amenability to rehabilitation, diminished capacity, organic brain syndrome.

[28] The 1991 decision was the result of a resentencing. The supreme court had previously specifically *upheld* a finding that Mr. Cooper was the killer. *Cooper v. State*, 336 So.2d at 1141 (Fla.1976).

mitigation and would have found ample evidence to support the life verdict: Mr. Sochor's co-operation with authorities, his remorse, his disturbed mental state at the time of the crime, his troubled childhood, abuse suffered at the hands of his parents, his problems with alcohol and drugs, his consumption of alcohol on the night of the murder, his record as a hard worker and support for his family, and his psychosexual disorder. *See Holsworth* and *McCrae*.

In light of the decisive impact of a jury's verdict on appellate review and appellate consideration of mitigation such as that at bar, any proper harmless error analysis must consider the effect that the improper submission of an aggravating circumstance may have had on the jury. The Florida court has itself elsewhere recognized this point. In *Elledge v. State*, 346 So.2d 998, 1003 (Fla.1977), the court wrote that, where, as here, the trial court has at least impliedly considered nonstatutory mitigating circumstances by writing that it weighed mitigating circumstances against aggravating circumstances, the consideration of an improper aggravating factor requires new jury sentencing proceedings:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial. . . .

See also Trotter v. State, 576 So.2d 691 (Fla.1991), *Omelus v. State*, 584 So.2d 563 (Fla.1991), *Jones v. State*, 569 So.2d 1234, 1238-39 (Fla.1990). Similarly, in affirming sentences, it has considered whether the error would have affected either the judge *or the jury*. *Herring v. State*, 580 So.2d 135 (Fla.1991), *Hill v. State*, 515 So.2d

176 (Fla.1987). Thus it wrote in *Riley v. Wainwright*, 517 So.2d 656, 659 (Fla.1987):

> If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

The court has ordered new jury sentencing proceedings because of errors involving jury instructions,[29] evidentiary rulings,[30] improper use of an aggravating circumstance,[31] limitation of defense argument,[32] and improper prosecutorial argument,[33] and has ordered new jury sentencing in death verdict cases even where the trial judge specifically found no mitigating circumstances.[34]

New jury sentencing proceedings are required where an instructional error would not affect the evidence that was presented,[35] and where the trial court has stated the error did not affect its sentencing decision:

> It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation. If so, the trial judge could not override the jury's recommendation and sentence Hall to death.

Hall v. State, 541 So.2d 1125, 1128 (Fla.1989).

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[29] *Stewart v. State*, 558 So.2d 416 (Fla.1990).

[30] *Colina v. State*, 570 So.2d 929 (Fla.1990).

[31] *Omelus; Hill v. State*, 549 So.2d 179 (Fla.1989).

[32] *Jones*, 562 So.2d 1234.

[33] *Taylor v. State*, 583 So.2d 323 (Fla.1991).

[34] *Jones*, 569 So.2d 1234 (double homicide), *Taylor* (unanimous death recommendation), *Colina*.

[35] *Waterhouse v. State*, 522 So.2d 341 (Fla.1988) (jury resentencing necessary where original jury was presented nonstatutory mitigating evidence, but was told that it could not consider it).

To be sure, the Florida court has not consistently followed *Elledge*.[36] Florida cases on harmless error are gen-

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[36] There is no discernible pattern in the cases as to when the court will affirm, when it will reverse for judge resentencing, and when it will reverse for jury resentencing. In *Rivera v. State*, 561 So.2d 536 (Fla.1990), the court affirmed after striking one of four aggravating circumstances used by the trial court, even though the trial court found statutory mitigation that the defendant was extremely disturbed at the time of the murder. *See also Rutherford v. State*, 545 So.2d 853 (Fla.1989) (striking one of four circumstances, but affirming even though court found statutory mitigation of lack of significant prior criminal activity), *Shere v. State*, 579 S.2d 86 (Fla.1991) (striking one of three circumstances, but affirming even though court found statutory mitigation of defendant's age). But in *Campbell*, the court ordered resentencing without a jury after striking one of four aggravating circumstances where the trial court found nothing in mitigation. *See also Dailey v. State*, 16 Fla. L. Week. S740 (Fla. Nov. 14, 1991) (ordering judge resentencing after striking two of five aggravating circumstances where jury unanimously recommended death and trial court's sentencing order stated: "This Court does not consider any of the factors presented by the Defendant to mitigate this crime."). And in *Omelus*, the court ordered new jury proceedings after striking one of three aggravating circumstances where the trial court found only in mitigation the disparate treatment of the defendant's hireling. In *Trotter*, the initial decision ordered resentencing without jury proceedings, 16 Fla. L. Week. S17, S18, but the court changed the relief on rehearing to jury resentencing without explanation. 576 So.2d at 694. At times, the announced reason for reversal involves the size of the jury vote for death. *Alvin v. State*, 548 So.2d 1112 (Fla.1989), *Omelus*. At other times, the decision turns on the nature of the circumstance: the premeditation and heinousness circumstances are considered worse than the others, and their presence or absence can be crucial in the decision whether to reverse. *Hardwick v. State*, 521 So.2d 1071 (Fla.1988), *Fitzpatrick*. Other times, the decision is based on whether striking the circumstance would affect the evidence before the jury, as though instructional error alone could have no effect on the verdict, *Herring*, while in *Stewart* the court ordered new jury proceedings for the trial court's refusal to instruct the jury on the "substantially impaired" statutory mitigating circumstance (§ 921.141(6)(f), Fla.Stat.), even though the defense expert had testified that the defendant was "impaired but not substantially." (Curiously the court upheld the trial court's refusal to

erally inconsistent.[37] But the measure of state court compliance with *Parker* and *Clemons* cannot be left to the state court's own devices. When state law gives a verdict the effect that Florida's case law and constitution give to the penalty verdict, any kind of harmless error analysis that would satisfy *Parker* and *Clemons* must consider the case as submitted to the jury. If that submission involved a legally impermissible aggravator, harmless error review cannot be limited, as the Florida Supreme Court limited its review here, to subtracting the circumstance from the trial judge's sentencing findings, adding a trial judge finding of no mitigation to outweigh aggravating circumstances with which the jury may have agreed, and con-

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instruct on the nonstatutory circumstance of less than substantial impairment.)

[37] The main Florida case is *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986) (applying harmless error analysis to comment on silence of accused), in which the court wrote at page 1139:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test.

But the supreme court has often cited *State v. DiGuilio* in favor of the standard of which is disapproved! *See Burr v. State*, 576 So.2d 278, 280 (Fla.1990) ("overwhelming evidence"), *Dailey* ("other substantial evidence of guilt"), *Downs v. State*, 572 So.2d 895, 899-900 (Fla.1990) ("overwhelming proof"), *Shere* ("quality and quantum of incriminating evidence"), *Jackson v. State*, 575 So.2d 181, 189 (Fla.1991) (other evidence of guilt), *Duckett v. State*, 568 So.2d 891, 895 (Fla.1990) ("given all the other evidence").

In *Wickham*, the court struck one aggravating circumstance, ruled that the trial court had ignored extensive mitigating evidence, but affirmed with the brief statement that in light of the "very strong case for aggravaion, we find that the trial court's error in weighing the aggravating and mitigating factors could not reasonably have resulted in a lesser sentence." Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?*, 15 STETSON L. REV. 263 (1986) is a mordant account of the confusion in Florida's system of appellate review of death sentences.

cluding that the resulting sum of "three aggravating factors to be weighed against no mitigating circumstances . . . does not necessarily require resentencing." 580 So.2d at 604. The court denied Mr. Sochor a responsible weighing of legally cognizable aggravation against legally cognizable mitigation at any single stage of his trial or appeal.

II. "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE

A. The Court taught in *Proffitt* and *Maynard* that the "especially heinous, atrocious, or cruel" circumstance is facially unconstitutional and requires a narrowing construction, and ruled in *Godfrey v. Georgia*, 446 U.S. 420 (1980), *Maynard* and *Shell* that jury instructions without an adequate narrowing construction are unconstitutional. Mr. Sochor's jury received only this instruction on the circumstance:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
> . . . .
> 8. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

JA 326.[38] This instruction, virtually identical to the improper instruction used in *Clemons*, 110 S.Ct. 1441, 1445, n. 1 (1990), violates the teachings of *Godfrey*, *Maynard*, and *Shell*.

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[38] Mr. Sochor did not object to the instruction in the trial court. Nevertheless, the supreme court, while noting the lack of objection, reached the merits of this issue. 580 So.2d at 602-603, and n. 10. Florida law on whether an appellant can raise a jury instruction issue for the first time on appeal was unclear both at the time of Mr. Sochor's 1987 October trial and since. *See Ray v. State*, 403 So.2d 956, 961 (Fla.1981) (failure to object to instruction on improper lesser offense did not bar reversal), *Carter v. State*, 469 So.2d 194, 196 (Fla. 2d DCA 1985) (erroneous instruction on theory

Since the jury received an unconstitutional jury instruction, the resulting penalty verdict is unconstitutional. This is so even though the jury may have, and the judge did, find other aggravating circumstances. *Maynard, Clemons.*

Shell mandates reversal at bar. There the Court reversed the state supreme court's rejection of a *Maynard* attack on an improper jury instruction on the heinousness circumstance in a case in which the defendant severely cut a 68 year old widow in her home and beat her to death with a series of blows with a heavy metal object. The state supreme court's discussion showed that there was little mitigation. In addition to writing that its instruction did not violate the teachings of *Maynard* and citing *Clemons v. State*, 535 So.2d 1354 (Miss.1988) (circumstance limited to murders that are conscienceless or pitiless and unnecessarily torturous to victim) for the proposition that the circumstance had been constitutionally narrowed, the state court wrote that, even without the heinousness circumstance, the remaining circumstance (that the killing occurred during a robbery) sufficed to uphold the death sentence. *Shell v. State*, 554 So.2d 887, 906 (Miss.1989).

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of defense subject to review even where not preserved; citing cases); *Tobey v. State*, 533 So.2d 1198, 1200 (Fla. 2d DCA 1988) (en banc) (agreeing with *Carter*, but not applying it where error could not have affected verdict); *State v. Delva*, 575 So.2d 643, 644-45 (Fla. 1991) (failure to object to erroneous instruction on uncontested element of offense bars appellate review, indicating that court would have reached merits if error had been "pertinent or material to what the jury must consider in order to convict"). Thus in *Smally v. State*, 546 So.2d 720 (Fla.1989). The court wrote that the absence of an objection below barred consideration of a *Maynard* claim, but then ruled on the *Maynard* claim, and has ever since cited *Smalley* as dispositive of the issue. *E.g. Occhicone v. State*, 570 So.2d 902, 906 (Fla.1990). Accordingly, the failure to object at bar does not preclude review. *See Ford v. Georgia*, 111 S.Ct. 850 (1991). Further, the pretrial motion attacking the circumstance as unconstitutionally unlimited put the trial court on notice as to the nature of his complaint regarding the circumstance. *See Osborne v. Ohio*, 110 S.Ct. 1691, 1704-1705 (1990).

The court went on to rule that the evidence supported the heinousness circumstance and the death sentence was proportionate. *Id.* at 907. Similarly, the supreme court at bar upheld the trial court's finding of the circumstance and ruled that the death sentence was not disproportionate.

From the foregoing, the issue at bar presents two questions: First, are *Shell*, *Maynard*, and *Clemons* inapplicable because in Florida the judge passes the ultimate sentence after considering the jury penalty verdict? Second, did the trial judge's finding of the "especially heinous, atrocious, or cruel" aggravating circumstance or the appellate review of that finding cure the unconstitutionality of the penalty verdict under *Walton*?

B. In *Proffitt*, the Court understood that the limiting construction was to provide guidance both to the jury (those recommending the sentence) and to the judge (the one imposing sentence): "We cannot say that the provision as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases."). 428 U.S. at 255-56. As already shown, the jury's penalty verdict is decisive of the sentencing decision in virtually all Florida capital cases. The rationale of *Maynard* and *Clemons* is that a death-sentencing procedure must ensure a principled means to distinguish those that receive the death penalty from those that do not. *Maynard*, 486 U.S. at 362. Since it is the jury's verdict which almost invariably distinguishes the defendants who will die from those who will live, that verdict must meet the requirements of *Maynard* and *Clemons*.

In *Smalley*, 546 at 722, the court rejected a similar argument. It wrote that Florida's death sentencing procedure differs from Oklahoma's in that the Florida penalty verdict is advisory, and the judge's sentencing order makes it possible to discern 'upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel."

Smalley proceeded on the tacit theory that constitutional errors in the jury sentencing proceedings are irrelevant because the trial court can "clean things up" with its sentencing order. The thinking seems to be that the state can confer on the defendant the right to a jury sentencing, but can then make the jury proceeding infirm through the use of unconstitutional jury instructions, so long as there is a later, constitutionally adequate, proceeding before the trial judge.

This procedure might be adequate if the trial judge's findings and weighing were independent of the flawed penalty verdict, which they are not.[39] The judge's findings are no substitute for the findings implicit in the jury's verdict, and where there has been a life verdict, the judge's findings count for naught. *E.g. Cooper*, 581 So.2d 49; *Ferry v. State*, 507 So.2d 1373, 1377-78 (Fla.1987) (specifically rejecting argument that judge's weighing could substitute for jury's). *Smalley* ignores the statements in *Proffitt* that the jury needs guidance in applying the circumstance and in *Hitchcock* that limitation of the Florida jury's consideration of mitigation violates the Eighth Amendment. It is simply irrational for Florida to rely on the jury as the principal in its sentencing process but then give the jury a patently unconstitutional jury instruction that fosters arbitrary application of the death penalty.

C. In *Walton*, the Court considered the impact of *Maynard* and *Clemons* on a purely judge sentencing state. The *Walton* analysis, which assumes that the state supreme court has adopted an acceptable definition of the circum-

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[39] Thus, this case does not present the question of whether a truly independent sentencing determination by the judge might satisfy *Clemons* and *Walton*. *See Baldwin v. Alabama*, 472 U.S. 372, 382 (1985) (erroneous jury recommendation irrelevant since court gave no deference to it, noting result might differ if, as in Florida, "the judge were obligated to give some deference" to tainted recommendation).

stance, is that the trial court is assumed to know and to apply that construction and that, even if the trial court does not, the appellate court may, under *Clemons*, either make its own determination that the evidence supports the circumstance or make a determination that, even without the circumstance, the death penalty would be appropriate.

Assuming *arguendo* that *Walton* applies to Florida (and Mr. Sochor argues that it does not because the jury is the primary actor in Florida's sentencing scheme), the Florida courts' treatment of the circumstance still require reversal. Florida does not have a uniform narrowing construction of the circumstance. The trial court did not apply the correct narrowing construction either expressly or by implication, and instead employed an improper construction. The supreme court did not make its own determination of the circumstance and made no determination that the death sentence would not be affected if the circumstance were struck.

i. *Florida has no consistent standard for the circumstance.* It is not enough to have an appropriate narrowing construction: the state must apply the construction consistently. Picking and choosing among various constructions on a case-by-case basis violates the Eighth Amendment. *Maynard*, 486 U.S. at 360 (discussing Tenth Circuit opinion with approval). Florida's circumstance suffers from this flaw. In *Proffitt*, the Court approved a construction of the circumstance that limited it to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 428 U.S. at 254-56 (plurality opinion). This construction stemmed from these definitions in *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with

> utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

It is immediately apparent that *State v. Dixon* said that the "conscienceless . . . pitiless . . . unnecessarily torturous" crime was only "to be included": the Florida court did not expressly *limit* the application of the circumstance to such crimes.[40] This small point has had large consequences: although the court sometimes uses the *Proffitt* limitation, it more frequently substitutes different standards for the circumstance on a case-by-case basis.

Although the Florida Supreme Court wrote in *Smalley* that it had "continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim," history does not bear out this claim. In 1982, the court disapproved narrowing *State v. Dixon* limitations, *Vaught v. State*, 410 So.2d 147, 151 (Fla.1982) (specifically rejecting claim, based on *State v. Dixon*, that circumstance focuses on infliction of physical pain or mental anguish),

[40] Indeed, the court considered the "conscienceless . . . pitiless . . . unnecessarily torturous" language to be surplusage. It adopted the following jury instructions in 1975, which give no hint that the circumstance is limited only to such crimes:

> That the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others, pitiless.

Standard Jury Instructions in Criminal Cases, 78 (1975). *See Pope v. State*, 441 So.2d 1073, 1077 (Fla.1984). In *Pope*, the court approved "as a definitive statement of the law," jury instructions deleting any reference to the *Proffitt* construction.

and in 1984, it removed the constitutionally approved construction. *Pope*, 441 So.2d at 1077-78 (disapproving of requirement that murder be "conscienceless or pitiless": "No further definitions of the terms are offered, nor is the defendant's mindset ever at issue."). Since then, the court has wavered dramatically in its application of the circumstance.

Sometimes it has apparently followed *Proffitt*, ruling that the circumstance includes both a mental element of torturous intent, and the physical element that the killing was unnecessarily torturous.[41] *Mills v. State*, 476 So.2d 172, 178 (Fla.1985) ("The intent and method employed by the wrongdoers is what needs to be examined."), *Teffeteller v. State*, 439 So.2d 840, 846 (Fla.1983) (error to find circumstance even where decedent "lived for a couple of hours in undoubted pain and knew that he wasfacing [sic] imminent death"; no evidence of torturous intent), *Mendyk v. State*, 545 So.2d 846, 850 (Fla.1989) (applying circumstance where defendant deliberately tortured decedent for a lengthy period of time).

Other times, it has regarded the mental element of torturous intent as being of paramount importance. *E.g. Porter* (record did not show torturous intent),[42] *Santos*

[41] The court has never stated what makes a murder "unnecessarily" torturous. Presumably the term refers to homicides where the killers have gone out of their way to select torturous or very painful methods of killing.

[42] The court wrote:

> We agree that the murder of Williams did not stand apart from the norm of capital felonies, nor did it evince extraordinary cruelty. We see little distinction between this case and *Amoros v. State*, 531 So.2d 1256, 1261 (Fla.1988), wherein the Court struck the trial court's finding of especially heinous, atrocious, or cruel on a finding that the murderer fired three shots into the victim at close range. Moreover, this record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was *meant* to be deliberately and extraordinarily painful. The state has not met its burden of proving this

v. State, 16 Fla.L.W. S633 (Fla. Sept. 26, 1991).[43]

But in *Hitchcock v. State*, 578 So.2d at 692, it wrote that the absence of a torturous intent is irrelevant: "That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's." *See also Mason v. State*, 438 So.2d 374, 379 (Fla.1983) (circumstance "pertains to the nature of the killing itself"), *Stano v. State*, 460 So.2d 890, 893 (Fla. 1984) (same), *Pope* (defendant's mindset never at issue). On the other hand, the court wrote in *Vaught* that the circumstance did not require infliction of physical pain or mental anguish. 410 So.2d at 151 (citing cases).

In *Lloyd v. State*, 524 So.2d 396, 403 (Fla.1988), the court wrote that the circumstance would apply either if the unconstitutionally vague standard of "extremely wicked or shockingly evil" were applied or if the crime were "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of," the decedent's suffering. In *Jackson v. State*, 498 So.2d 906, 910 (Fla.

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factor beyond a reasonable doubt, and the trial court erred in finding to the contrary.

564 So.2d at 1063 (emphasis in original).

[43] As we recently explained in *Cheshire v. State*, 568 So.2d 908 (Fla.1990), this factor is appropriate in torturous murders involving extreme and outrageous depravity. A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. *Id.* at 912. 'The torture-murder in *Douglas*, which involved heinous acts extending over four hours, illustrates a case in which this factor was appropriately found. *Douglas*, 575 So.2d at 166. The present murders happened too quickly with no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims. Accordingly, the trial court erred in finding this factor to be present.

1986), it read the circumstance so broadly as to cover any capital crime that is "accompanied by such additional acts as to set the crime apart from the norm of capital felonies."

Thus the court applies divers standards:[44] limited to crimes that are conscienceless or pitiless, and unnecessarily torturous, *Proffitt*, *Smalley*; including but not limited to such crimes, *State v. Dixon*; defendant's mindset is never at issue, *Pope*; infliction of physical pain or mental anguish irrelevant, *Vaught*; murder must be meant to be deliberately and extraordinarily painful, *Porter*; torturous intent irrelevant, *Hitchcock*; murder accompanied by additional acts setting it apart from norm, *Jackson*, 498 So.2d 906; *Harvard v. State*, 414 So. 2d 1032 (Fla.1982); extremely wicked or shockingly evil. *Lloyd*.[45]

ii. *The trial judge's determination of the circumstance was flawed.* Even if Florida did consistently use the *Proffitt* limitation, the trial court did not purport to apply it at bar.[46] At most, the sentencing order stated

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[44] Sometimes on the same day. On May 2, 1991, the court explicitly applied the torturous intent standard in striking the circumstance in *McKinney v. State*, 579 So.2d 80 (Fla.1991) ("The evidence does not show that the defendant intended to torture the victim."), but implicitly applied the *Hitchcock* "intent irrelevant" standard in affirming the circumstance in the instant case without any inquiry into Mr. Sochor's intent.

[45] As may be expected, the lack of a uniform standard results in inconsistent results, with the consequence that the circumstance itself is unconstitutional under *Maynard*. This issue is discussed later in this brief.

[46] The Florida law presumption is not that the trial judge knew and applied the correct standard, but that he followed the jury instruction. *Zeigler v. Dugger*, 524 So.2d 419, 420 (Fla.1988). *See also Henry v. State*, 586 So.2d 1033 (Fla.1991) (even though trial court's order reflected use of wrong standard in determining mitigation, supreme court assumed that judge followed correct standard set out in jury instructions).

that, although the facts of the case were unclear, the evidence showed a struggle [47] in which Ms. Gifford screamed and scratched Mr. Sochor, so that she suffered fear and emotional trauma before her death. Based on an eccentric reading of Dr. Wright's testimony, the judge apparently concluded that the strangulation at bar was "slow and painful." The court made no specific finding that the crime was "conscienceless or pitiless" and "unnecessarily torturous," and the evidence could not have supported such a finding: the evidence was that Mr. Sochor, in a wild rage, strangled the woman in a quick struggle.

iii. *The Florida Supreme Court's review did not satisfy the requirements of* Walton. Apparently employing its deferential abuse of discretion standard of review,[48] the supreme court concluded that the trial court "properly found this aggravating factor." JA 379; 580 So. d at 603. It did not see any error in the proceedings below, and so did not undertake to make its own finding respecting the circumstance. Most importantly, it did not determine whether the evidence supported the circumstance "as properly defined." *Walton*, 110 S.Ct. at 3075. It wrote only that the evidence supported "the conclusion of horror and contemplation of serious injury or death," and that one could infer foreknowledge of death, extreme anxiety and fear from strangulation. It did not purport to use the *Proffitt* definition, apparently opting instead for the "defendant's mindset never at issue" version of the circumstance. It did not, and could not, say that the murder was unnecessarily torturous or that it was conscienceless or pitiless.

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[47] The order contained a significant inaccuracy on this point. The evidence simply did not show that Ms. Gifford "was forcibly removed from the truck while she pleaded for help and even begged for her life." State court fact findings are not to be accepted where not supported by the record. *Yates*, 111 S.Ct. at 1896.

[48] *Gaskin*.

Needless to say, the court, having seen no error in the application of the circumstance, did not determine whether the sentencing decision would have been the same without the circumstance.

D. We now come to the question of whether Florida's circumstance, held constitutional in *Proffitt*, is now unconstitutional under *Maynard*. In *Maynard*, the Court found the Oklahoma circumstance unconstitutional, approving the Court of Appeals' conclusion, based on a review of the case law, that

> while the Oklahoma court had considered the attitude of the killer, the manner of the killing, and the suffering of the victim to be relevant and sufficient to support the aggravating circumstance, that court had "refused to hold that any one of those factors *must* be present for a murder to satisfy this aggravating circumstance." 822 F.2d. at 1491.

486 U.S. at 360. The court concluded in *Cartwright v. Maynard*, 822 F.2d 1477, 1489 (10th Cir.1987), after a review of the very scattered Oklahoma case law on the circumstance, that cases could be cited to support application of the circumstance to almost any set of facts, and wrote:

> When the sentencer is free to rely upon any particular event that it believes makes a murder "especially heinous, atrocious, or cruel," the meaning that the sentencer attached to this provision "can only be the subject of sheer speculation." *Godfrey*, 428 U.S. at 429, 100 S.Ct. at 1765. Indeed, courts that have considered similar aggravating circumstances have held:
>
> > [A murder] can be especially heinous because the victim is too young, too old, or because the defendant chose his victims so that they were not too young or too old. If the defendant killed for no reason, the murder is especially heinous, as is a murder committed for a reason the appellate court does not like. A killing is especially heinous if the victim is aware of the impending

> death, and also if the killing is done without warning.
>
> Rosen, *The Standardless Standard*, 64 N.C.L.REV. at 989 (footnotes omitted). The direction of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*. No objective standards limit that discretion.

822 F.2d at 1491.

Florida cases reveal a similarly scattered pattern. The advanced years or helplessness of the decedent has been considered relevant enough to be emphasized [49] and has also been considered irrelevant.[50] Gender of the decedent is sometimes decisive.[51] That the victim begged for life while in excruciating pain may or may not support the circumstance.[52] The circumstance is struck where the defendant leaves the victim to die a slow, painful lingering death,[53] but is upheld where the defendant ends the suffering with a *coup de grâce*.[54] A cold-blooded killing

[49] *Steinhorst v. State*, 412 So.2d 322, 340 (Fla.1982) ("execution-type slayings, requiring cold, brutal, and heartless calculation to murder by firing a shot into the skull of a defenseless human being"); *Johnston v. State*, 497 So.2d 863, 871 (Fla.1986) (citing cases emphasizing advanced years of decedent).

[50] *Clark v. State*, 443 So.2d 973, 977 (Fla.1983) (murder of "a disabled and defenseless elderly woman is a vile and despicable act," but does not satisfy circumstance).

[51] *Compare Grossman* (taking firearm from female officer during violent struggle and shooting her; circumstance upheld) with *Brown v. State*, 526 So.2d 903 (Fla.1988) (taking firearm from male officer during violent struggle and shooting him while, in "excruciating pain," he begged for his life; circumstance struck).

[52] *Compare Brown* with *Bruno v. State*, 574 So.2d 76 (Fla.1991) (circumstance upheld where defendant beat and shot victim begging for his life).

[53] *Teffeteller*.

[54] *Farinas v. State*, 569 So.2d 425 (Fla.1990); *Gaskin*.

for revenge is heinous,[55] but a cold, calculated and premeditated "crime of passion" is not.[56] Harassing and stalking one's ex-wife and killing her with a single gunshot is heinous,[57] but stalking her down, threatening her, and chasing her down the street while she frantically clutches her child, and then shooting her and the child is not heinous,[58] whereas repeatedly threatening a woman, holding her at gunpoint, shooting the telephone when she tries to call for help, and killing her as she holds her children in her arms is heinous,[59] but handcuffing a woman, taking her to a cemetery, and then pressing a gun to her cheek and shooting her is not.[60] Killing a person in his home is heinous because it "sets this crime apart from murder committed in, for example, a street, a store, or other public place," [61] but breaking into one's lover's house, and shooting her down as she fled in the presence of her children is not,[62] while shooting a person twice at home is heinous.[63] As in Oklahoma, a killing is especially heinous if the victim is aware of impending death,[64] and also if the killing is done without warning.[65]

[55] *Johnson v. State*, 393 So.2d 1069, 1073 (Fla.1981).

[56] *Porter*.

[57] *Harvard*.

[58] *Santos*.

[59] *Downs*, 574 So.2d 1095.

[60] *Robinson v. State*, 574 So.2d 108 (Fla.1991) (decided same week as *Downs*).

[61] *Breedlove v. State*, 413 So.2d 1, 9 (Fla.1982).

[62] *Wright*.

[63] *Troedel v. State*, 462 So.2d 392 (Fla.1985).

[64] *Huff v. State*, 495 So.2d 145 (Fla.1986) (victim raised hand when son pointed gun at him, indicating awareness of impending death).

[65] *Vaught*.

Like the Oklahoma court, 486 U.S. at 360, the Florida court has considered the attitude of the killer,[66] the manner of the killing,[67] and the suffering of the victim [68] to be relevant and sufficient to support the aggravating circumstance, but it has refused to hold that any one of these factors must be present for a murder to satisfy the circumstance.

The article by Professor Rosen cited in the Tenth Circuit's opinion in *Cartwright* shows that the overall picture of Florida cases differs little from the confused picture of Oklahoma cases:

> The incoherency of the standards applied by the Florida Supreme Court is readily evident. The defendant's lack of remorse has been used to support an especially heinous finding in one case and has been deemed irrelevant in another case. The victim's intoxication has been used both to uphold and to reverse an especially heinous finding. The victim's helplessness before the shooting has been used to support an especially heinous finding and to reject an especially heinous finding. Both the victim's knowledge that he was going to die and the defendant's willingness to kill a sleeping victim, who thus could not have known of impending death, have supported findings of especially heinous circumstances. Murders that the Florida Supreme Court has loosely described as "execution-style" murders have been deemed both especially heinous and not especially heinous.

Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L.Rev. 941, 974 (1986) (citations omitted). Because

[66] *Vaught* (rejecting argument that circumstance could not apply to spontaneous shooting without physical pain or mental anguish; circumstance applies to "cold and calculating" killing) (citing cases).

[67] *Mason*, 438 So.2d at 379 ("pertains to the nature of the killing itself"); *Stano; Breedlove.*

[68] *Hitchcock v. State.*

cause Florida, like Oklahoma, has been inconsistent in ruling what must be proven to support the circumstance, it has not applied the circumstance constitutionally.

Florida's tangle of cases reveals no doctrinal pattern. No one sitting down with the variety of standards that the supreme court uses could, from those standards, infer how the circumstance will be applied from one day to the next. If there is any pattern at all from the Florida cases as a whole it is that, in recent years, the court has sometimes considered shootings less heinous than other forms of homicide, reversing where it does not perceive the shooter as having had a torturous intent. *E.g.*, *Santos*; *Burns v. State*, 16 Fla. L. Week. S 389 (Fla. May 16, 1991). This despite the fact that the court has historically considered shootings more "conscienceless" than other killings because they are "coldblooded." [69]

This apparent (and unannounced) distinction between shooting cases and other cases can be constitutional only if it bears on the defendant's culpability according to standards of reasoned moral judgment of the defendant's moral guilt. *Enmund v. Florida*, 458 U.S. 782, 800 (1982); *Penry*, 492 U.S. at 319. It may be that the difference between shootings and other homicides can reflect a difference in culpability. But there is nothing about Mr. Sochor's act of strangling a young woman in a sudden and wild rage that is more culpable than, *e.g.*, deliberately shooting down a highway patrolman standing in a watery ditch begging for his life (*Burns*) or chasing down a screaming woman with a small child and shooting them both in the head (*Santos*). The court's striking the circumstance in *Burns* and *Santos* on a standard of lack of torturous intent, while upholding the circumstance at bar without any in-

[69] *E.g. Hargrave v. State*, 366 So.2d 1, 5 (Fla.1979) (execution-style shooting extremely wicked and shockingly evil); *Vaught* (spontaneous shooting); *Jones v. State*, 411 So.2d 165, 169 (Fla. 1982) ("shot him to death point-blank, in the style of an execution").

quiry into such intent, is not simply a failure to conduct state law proportionality, it is the application of different legal standards to the same aggravating circumstance for reasons that have nothing to do with the definition of the circumstance approved in *Proffitt*.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

Section 921.141, Florida Statutes

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premediated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

91-5843

Case No. _____

Supreme Court, U.S.
FILED
FEB 3 1992
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In The
Supreme Court of the United States
October Term, 1988

DENNIS SOCHOR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF ON THE MERITS IN SUPPORT OF RESPONDENT

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February 3, 1992

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FLORIDA SUPREME COURT CONDUCTED A PROPER HARMLESS ERROR ANALYSIS IN CONFORMITY WITH BOTH THE UNITED STATES CONSTITUTION AND *CLEMONS v. MISSISSIPPI.*

II. WHETHER THE AGGRAVATING FACTOR OF "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" HAS BEEN SUFFICIENTLY DEFINED TO SATISFY THE REQUIREMENTS OF *MAYNARD v. CARTWRIGHT,* 486 U.S. 356 (1988); AND *WALTON v. ARIZONA,* 497 U.S. ____, 111 L.Ed.2d 511 (1990).

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STATEMENT OF THE CASE

Respondent accepts Sochor's statement of the case, however, for this Court's edification a summary of the facts is included in Respondent's Appendix A pages JA i-vi.

SUMMARY OF THE ARGUMENT

Appellate review of capital cases in Florida is constitutionally sound. The Florida Supreme Court's harmless error analysis, in general and as applied to the instant case, is in conformity with this Court's precedent on the issue.

Under Florida's sentencing scheme, the jury's role is strictly advisory. The trial judge makes independent factual findings, in writing, to support a sentence of death. Those written findings are the basis for determining the appropriateness of the sentence to a given case.

The Florida Supreme Court carefully reviewed the record and upheld the trial court's findings regarding the total absence of any mitigating evidence. The Court then reviewed the trial judge's sentencing order regarding aggravating factors. After finding insufficient evidence to sustain one of the aggravating factors, the Court was able to conclude that, beyond a reasonable doubt that absent one of the aggravating factors, the trial court would still have imposed the death penalty. This procedure satisfies the

requirements of *Clemons v. Mississippi,* 110 S.Ct. 1441 (1990).

The Florida Supreme Court also found that the aggravating factor that the murder was "especially heinous, atrocious, or cruel" was proven beyond a reasonable doubt.

In reviewing this aggravator, the Florida Supreme Court continues to apply the standard set out in the polestar case of *State v. Dixon,* 283 So.2d 1 (Fla. 1973), *cert. denied,* 416 U.S. 943 (1974), and approved in *Proffitt v. Florida,* 428 U.S. 242 (1976).

The instant case is controlled by *Walton v. Arizona,* 497 U.S. ____, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), wherein the Court found that in Arizona, like Florida, the judge imposes sentence. *Maynard v. Cartwright,* 486 U.S. 356 (1988), and *Shell v. Mississippi,* 498 U.S. ____, 111 S.Ct. 313, 112 L.Ed.2d 1 (1991), do not apply to judge sentencing schemes.

I. THE FLORIDA SUPREME COURT CONDUCTED A PROPER HARMLESS ERROR ANALYSIS IN CONFORMITY WITH BOTH THE UNITED STATES CONSTITUTION AND *CLEMONS v. MISSISSIPPI.*

Sochor claims that the Florida Supreme Court's harmless error analysis is constitutionally infirm in several respects. Specifically, he alleges that 1) although an aggravating factor has been struck, the court automatically affirms a death sentence provided that at least one aggravating factor remains; 2) the Florida Supreme Court does not apply its harmless error test in any consistent or rational manner; 3) the Court's limited and mechanical analysis does not include proper consideration of the effect the impermissible aggravating factor had on the jury's death recommendation

herein; 4) the analysis did not take into account the legally cognizable aggravation against legally cognizable mitigation;[1] and 5) the court's review of his sentence amounted to nothing more than a tabulation of the aggravating and mitigating circumstances of the trial court's findings. As such, Sochor asserts appellate review in Florida and as applied *sub judice,* violates *Clemons v. Mississippi,* 494 U.S. __, 108 L.Ed.2d 812 (1990) and *Parker v. Dugger,* 498 U.S. __, 112 L.Ed.2d 812 (1991).

The first two allegations are indictments against Florida's capital sentencing in general. Sochor's claim that the supreme court conducts its harmless error analysis in an automatic or mechanical fashion was clearly rejected by the Court in *Barclay v. Florida,* 463 U.S. 939, 957-958 (1983).[2]

Early on, cases were generally remanded for resentencing if an aggravating factor had been struck. *Barclay, supra, citing to Elledge v. State,* 346 So.2d 998 (Fla. 1977). Since that time, the Florida Supreme Court has not automatically

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1 This Court denied certioari review as to the first question regarding whether the trial court or the Florida Supreme Court properly considered the mitigating evidence presented.

2 *See also, Randolph v. State,* 463 So.2d 186 (Fla. 1984); *Songer v. States,* 544 So.2d 1010 (Fla. 1989); *Nibert v. State,* 508 So.2d 1 (Fla. 1987). In all three cases the Florida Supreme Court either imposed a life sentence or remanded for reconsideration *where there was at least one valid aggravating factor.*

remanded for resentencing. *Songer v. State,* 544 So.2d 1010 (Fla. 1989).[3]

Further Sochor's claim that there is no discernible rational basis for appellate review of death sentences in Florida is incorrect.

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3 Indeed, contrary to this Court's generalization in *Parker v. Dugger,* 498 U.S. ___, 112 L.Ed.2d 812, 815 (1991), that the Florida Supreme Court's practice is to remand for resentencing when an aggravating factor is struck and *mitigation* exists, Florida *caselaw reflects* that a remand is only required if the error is *not harmless* or if the Court is unable to apply harmless error because there is reasonable doubt as to the weight given the factors by the trial court. *Hargrave v. State,* 366 So.2d 1 (Fla. 1978); *Brown v. State,* 381 So.2d 690 (Fla. 1980); *Bassett v. State,* 449 So.2d 803 (Fla. 1984); *Hamblen v. State,* 546 So.2d 1039 (Fla. 1989). Specifically, in accord with *Clemons v. Mississippi, supra,* the Florida Supreme Court either applies harmless error and affirms or reverses and remands for further consideration by the trial court. In fact, the Florida Supreme Court is mandated by statute to apply a harmless error analysis before reversing a conviction or sentence. Fla.Stat. 59.041 and 924.33. *See Clark v. State,* 443 So.2d 973 (Fla. 1983)(harmless error analysis); *Kennedy v. State,* 455 So.2d 351 (Fla. 1984)(same); *Pope v. State,* 496 So.2d 798 (Fla. 1986)(same).

Certainly, this Court did not intend in its opinion in *Parker, supra,* to suggest that the Eighth Amendment is violated any time a state appellate court has committed an error in its application of state law or chooses to ignore or not continue to adhere to the well-thought out prior decisions. Nor can this Court be suggesting that unless an appellate court "fully" articulates its reasons for determining the disposition of a case, an Eighth Amendment violation occurs. Most recently in *Ylst v. Nunnemaker,* 501 U.S. ___, 115 L.Ed.2d 706, 717 (1991), the Court stated, "[t]he maxim is that silence implies consent, not the opposite — and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below." When a court has exercised its appellate judgment in a certain way, either applying a "procedural bar" or a "harmless error" analysis, presumably elaboration on a point at issue is only necessary to correct errors or interpret the law. Unless an assertion is made that would "constitute *strong* evidence that the presumption, as applied, is wrong," state courts should continue to enjoy the deference accorded them in *Sims v. Georgia,* 385 U.S. 38 (1967) and *La Vallee v. Della Rose,* 410 U.S. 690 (1973).

In all capital cases the sufficiency of the evidence at the guilt and penalty phases is reviewed. *Adams v. State,* 412 So.2d 850, 855 (Fla. 1982). If a case is affirmed in all respects with regard to the issue raised and the Court is satisfied that § 921.141, Fla.Stat., has been properly applied, the court then conducts a proportionality analysis. *Id.* The sentence is either affirmed if proportionate, *Riechmann v. State,* 581 So.2d 133 (Fla. 1991), or remanded for imposition of a life sentence if the death sentence is deemed disproportionate. *Songer, supra.*[4]

In cases where the Court has reviewed the trial court's order and determined that either an error has occurred regarding factual findings in the sentencing circumstances, *Rivera v. State,* 545 So.2d 864 (Fla. 1989), or that an error has occurred regarding the admissibility of evidence, *Derrick v. State,* 581 So.2d 31 (Fla. 1991), the harmlessness of the error is reviewed. If the error is harmless, the Court

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4 *See Smalley v. State,* 546 So.2d 720 (Fla. 1989) and *Nibert v. State,* 574 So.2d 1059 (Fla. 1990) (substantial mental mitigating evidence made death a disproportionate sentence); centra: *Hudson v. State,* 538 So.2d 829 (Fla. 1989) (death is appropriate where two valid aggravating factors existed, nothing in mitigation, and the crime was not a domestic confrontation, defendant was armed and had a prior felony).

will affirm the death sentence.[5] Remand to the trial judge will be ordered if the error is not harmless. *Gafford v. State,* 387 So.2d 333 (Fla. 1980) (remand before trial court when error involved an improper doubling of two aggravating factors to-wit: robbery and pecuniary gain. One valid aggravating and two statutory mitigating factors did not permit court to find with confidence error harmless). Error effecting the entire sentencing process will, of course, require remand for an entirely new sentencing including impaneling a new jury. *Derrick, supra* (harmful error to admit defendant's statement at penalty phase that he would kill again); *See, Bello v. State,* 547 So.2d 914 (Fla. 1989).

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5 Harmless error analysis applies to jury instructions, *Stewart v. State,* 558 So.2d 416 (Fla. 1990); limitation on defense argument and strategy, *Colina v. State,* 570 So.2d 929 (Fla. 1990); and improper prosecutorial argument, *Bertolotti v. State,* 476 So.2d 130 (Fla. 1985). *Rivera, supra,* the striking of two aggravating factors held to be harmless error because of the existence of four other valid aggravating circumstances and no mitigating circumstances.

The case *sub judice* falls into this second scenario. The jury recommended death by a vote of ten to two. The trial court imposed a death sentence finding four aggravating factors and *nothing* in mitigation. Although the Florida Supreme Court found insufficient evidence of the "cold, calculated and premeditated aggravator," the striking of that factor did not effect the weighing process as there remained three valid aggravating factors to be weighed against nothing in mitigation. *Sochor v. State,* 580 So.2d 595 (Fla. 1991). *See also Capehart v. State,* 583 So.2d 1009 (Fla. 1991)(four aggravating factors at least one nonstatutory mitigating factor; court struck one aggravator, harmless error — death appropriate). Although the Florida Supreme Court has never countenanced the idea, when an aggravating factor is found wanting, and viable aggravation exists and no mitigation is present, a strong presumption that the error was harmless is not impermissible.

In judicial override cases where the trial court imposes death following a jury recommendation of life, *Tedder v. State,* 322 So.2d 908, 910 (Fla. 1975) controls.[6]

Absent a claim of fundamental error, the application of the harmless error doctrine has been employed to review both guilt and sentencing issues since "time in memoriam." State appellate courts, like Florida, have fashioned *Chapman* — like clones of harmless error analysis which permit courts to review in a cognizable manner trial errors which are not of such a fundamental nature that the validity of a judgment or correctness of a sentence is brought into question. In *Rose v. Clark,* 478 U.S. 570 (1986) for example, the Court applied a harmless error analysis as to whether the jury instructions found therein violated *Sandstrom v. Montana,* 422 U.S. 510 (1979). In *Clemons v. Mississippi,* 494 U.S. __, 108 L.Ed.2d 725 (1990) this Court articulated a distinction between

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6 The *Tedder* standard provides that in order to sustain a sentence of death following a jury recommendation of life, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." 322 So.2d at 910.

In *Parker v. Dugger, supra,* (a judicial override case) this court *did not* conclude that the Florida Supreme Court failed to comply with the *Tedder* standard. Rather, it found the Florida Supreme Court failed to consider "nonstatutory mitigation" presumably found by the trial court. *Parker,* 112 L.Ed.2d at 824. "[A]fter striking two aggravating circumstances, the Florida Supreme Court affirmed Parker's death sentence without considering the mitigating circumstances. This affirmance was invalid because it deprived Parker of the individualized treatment to which he is entitled under the Constitution. *See Clemons, supra,* at ___, 108 L.Ed.2d 725, 110 S.Ct. 1441." *Parker,* 112 L.Ed.2d at 827.

Remarkably *absent* from the *Parker* discussion and conclusion is *any* suggestion that the Eighth Amendment would require a harmless error analysis by the Florida Supreme Court of anything other than the aggravating and mitigating circumstance of that individual case. There is no constitutional mandate expressed, that in judicial override cases or for that matter, "nonjudicial override" cases, the Florida Supreme Court had to consider as part of a harmless error analysis, what impact the "error" would have had on the jury's recommendation.

errors which merely involve the invalidation of an aggravating circumstance supported by otherwise admissible evidence, in contrast to an error which allowed the jury to consider evidence that was incorrect or inaccurate.[7] *Id.* 108 L.Ed.2d at 742 n.5. The decision to apply harmless error must be made by the appellate courts. *Id.*[8]

To illustrate, in *Johnson v. Mississippi,* 486 U.S. 578 (1988) this Court was unable to say that an error, which allowed the jury to consider evidence which was ultimately determined to be incorrect, was harmless. Mississippi relied on a prior conviction of a capital defendant to sustain an aggravating factor. Subsequent to the sentencing proceeding the prior conviction was vacated. Because the sentencer in Mississippi heard evidence regarding the capital defendant's background that was materially inaccurate, coupled with the fact such evidence was repeatedly emphasized by the prosecutor, the error could not be deemed harmless. *Johnson,* 486 U.S. at 587.

Likewise, in *Satterwhite v. Texas,* 486 U.S. 249 (1988) a psychiatrist's testimony regarding the defendant's future dangerousness, lack of conscience and sociopathic nature was erroneously admitted at sentencing. *Satterwhite,* 486 U.S. at 259. Although this Court found the error harmful, the Court reaffirmed that a harmless error analysis was applicable to capital murder cases in general and penalty phases in particular. *See Wainwright v. Goode,* 464 U.S. 78, 86 (1983)(the trial court erroneously considered the defendant's future dangerousness when determining the appropriate sentence). Since the evidence was otherwise not constitutionally inadmissible, consideration of the evidence

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7 Although more difficult to apply a harmless error analysis to the latter, this Court has not suggested that harmless error review cannot be conducted. Quite to the contrary, "this Court noted in vacating the sentence that the Mississippi Supreme Court's refusal to rely on harmless error analysis in upholding the sentence was 'plainly justified' because the error 'extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible' and in fact permitted the jury to 'consider evidence that [was] revealed to be materially inaccurate'." 486 U.S. at 590. The Court did not hold that the Mississippi Supreme Court could not have applied harmless error analysis. *Id.*

The Florida Supreme Court has recently applied the harmless error analysis to a *Johnson v. Mississippi* claim. *Owen v. State,* __ So.2d __ Case No. 68,549 (Fla. January 23, 1992):

> "During the penalty proceeding before the jury, the State introduced evidence of Owen's convictions in the Delray Beach murder, sexual battery, and armed burglary. *See Owen.* The trial court used these convictions as a basis for finding as an aggravating factor that Owen had previously been convicted of another capital or violent felony. Owen now claims that he is entitled to a new sentencing proceeding because the Delray Beach convictions were subsequently reversed by this Court. *Id.* Based on our examination of the record, however, we conclude that use of this evidence was harmless error. Given the nature and extent of other evidence in aggravation presented to the jury we conclude that its recommendation would have been unchanged. We similarly conclude that the trial court's sentence would have been the same because the aggravating circumstance concerning prior conviction of a violent felony was adequately supported by Owen's conviction for attempted first-degree murder in a third case. *Owen,* slip opinion at 9.

8 The fact that harmless error analysis is applied in some instances and not in others is not evidence that a reviewing court acts arbitrarily in making such determinations. *Clemons,* 108 L.Ed.2d at 742.

Given this Court's emphasis on the "twin objectives of 'measured consistent application' and 'fairness to the accused'," *Eddings v. Oklahoma,* 455 U.S. 104, 110-111 (1982), along with an individualized sentencing determination, *Lockett v. Ohio,* 438 U.S. 586 (1978), a decision to apply harmless error must be made on a case-by-case basis. *Clemons,* 108 L.Ed.2d at 742 n.7.

did not effect the balancing process. *Zant v. Stephens,* 462 U.S. 862, 887 (1983) (harmless error utilized albeit the Georgia Supreme Court struck an aggravating factor). This Court reasoned that the evidence admitted to support the suspect aggravating factor was properly admissible regardless of the fact that there was insufficient evidence to sustain the finding of that factor. *Johnson,* 486 U.S. at 590 n.9.

The Florida Supreme Court's harmless error approach, in general as well as in the instant case, is identical to the analysis set forth in *Chapman v. California,* 386 U.S. 18 (1967). Notwithstanding Sochor's assertions otherwise, a clear pattern emerges from the decision of the Florida Supreme Court.

In *State v. DiGuilio,* 492 So.2d 1129, 1135 (Fla. 1986) the Court explained harmless error analysis in generic terms:

> Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

The utilization of this analysis in capital cases results in constitutionally sound appellate review.[9] Once an aggravating factor has been struck, the court may affirm a death sentence *if,* and only if, it can conclude beyond a reasonable doubt that absent the aggravating factor, a sentence of death is appropriate based on the strength of the remaining aggravating factors weighed against the mitigating factors.

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9 In fact, the Florida Supreme Court in *Ciccarelli v. State,* 531 So.2d 129 (Fla. 1988), makes it clear that the harmless error standard of *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986) might be more difficult to overcome than *Chapman, supra,* or *United States v. Hastings,* 461 U.S. 499 (1983). Citing *DiGuilio,* the Court allowed that they "wish to make it clear that the harmless error test is to be *rigorously* applied, we examine the records ourselves rather than remanding... 491 So.2d at 1137;" and *Ciccarelli,* 531 So.2d at 131-132 — wherein the Court held:

> The examination of a record for the purpose of evaluating harmless error necessarily involves more than a resolution of contested facts. The function of an examination for this purpose is to take account of what the error meant to [the jury or sentencing judge], not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record. *Kotteakos v. United States,* 328 U.S. 750, 764, 66 S.Ct. 1239, 1247-1248, 90 L.Ed.1557 (1946).
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> This requires more than a mere totaling of testimony, and, in most instances, more than a mere reading of a portion of the record in the abstract. It entails an evaluation of the impact of the erroneously admitted evidence in light of the overall strength of the case and the defenses asserted. Unlike the initial decision of whether error occurred, which in many instances can be made from a fragment of the record or the examination of the law alone, the effect of error on the verdict is a different inquiry. It must, in most cases, be evaluated through the examination of the entire trial transcript. The court must determine *not* if there is overwhelming evidence of guilt, but if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error.

Capehart v. State, 583 So.2d 1009 (Fla. 1991), *cert. denied* January 21, 1992. Dispositive of the issue in *Capehart,* was the fact that the invalidation of an aggravating circumstance, unsupported by the evidence, did not influence the sentencing outcome. *See also Herring v. State,* 580 So.2d 135 (Fla. 1991) (striking "cold calculated and premeditated" held harmless as the facts before the jury were not changed despite invalidation of this factor).[10] If, however, the error infected the entire sentencing process, a remand is warranted for a "new sentencing proceeding." In other words, if the error altered the record regarding what evidence the sentencer should have heard *and* the sentencer was erroneously instructed, a new hearing will probably be ordered pursuant to § 921.141, Fla.Stat. *Jones v. State,* 569 So.2d 1234 (Fla. 1990).

The Supreme Court in *Jones,* concluded a new sentencing hearing was mandated due to an erroneous instruction and inadmissible evidence presented concerning a sexual battery on the victim's corpse. Under Florida caselaw acts occurring to the victim after death are inappropriate considerations in determining the sentence to be imposed. *Halliwell v. State,* 323 So.2d 557 (Fla. 1975). Likewise, in *Omelus v. State,* 584 So.2d 563, 565 (Fla. 1991) the jury was allowed to consider an aggravating factor that could not possibly be applied to the defendant who was the procurer

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10 The Florida Supreme Court has upheld death sentences despite the trial court's reliance on an invalid aggravating factor when other remaining valid aggravating factors are balanced against "little" in mitigation. *Shere v. State,* 579 So.2d 86 (Fla. 1991); *Green v. State,* 583 So.2d 647 (Fla. 1991) and cases cited therein; *Holton v. State,* 573 So.2d 284 (Fla. 1990); *Hill v. State,* 515 So.2d 176 (Fla. 1987), *cert. denied,* 485 U.S. 993, (1988); *Rogers v. State,* 511 So.2d 526 (Fla. 1987), *cert. denied,* 484 U.S. 1020 (1988); *Bassett v. State,* 449 So.2d 803 (Fla. 1984); *Brown v. State,* 381 So.2d 690 (Fla. 1980), *cert. denied,* 449 U.S. 1118 (1981); *Bruno v. State,* 574 So.2d 76 (Fla. 1991); *Mitchell v. State,* 527 So.2d 179 (Fla. 1988); *Wickham v. State,* 16 F.L.W. S777 (Fla. December 20, 1991).

of a murder and could not be held responsible for how the actual murderer committed the murder. The court remanded for resentencing before a newly impaneled jury even though the trial judge had not included that "factor" in his sentencing determination.[11] The same result has occurred even where inadmissible collateral crime evidence was admitted at the guilt phase and deemed harmless as to guilt, but found harmful as to sentencing. *Castro v. State,* 547 So.2d 111 (Fla. 1989).[12] The Court noted a distinct difference between the guilt and penalty phases:

> We are not persuaded, however, that McKnight's testimony was equally harmless as to the death sentence. Substantially different issues arise during penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase. What is harmless to

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11 *Hill v. State,* 549 So.2d 179, 184 (Fla. 1989)(case remanded for a new penalty phase hearing with a newly impaneled jury because the jury may have been improperly influenced by the incorrect information that "lack of remorse" is a proper consideration in aggravation, contrary to *Pope v. State,* 441 So.2d 1073 (Fla. 1983).

In contrast to the outcome in *Omelus,* the court in *Bowden* refused to find error even though the jury was instructed on an aggravating factor that the trial court did not find sufficient evidence to sustain. *Bowden v. State,* 16 F.L.W. S614 (Fla. September 12, 1991). This is so because there was admissible evidence before the jury which arguably could have sustained a finding of the aggravator, consequently the jury was not subjected to otherwise inadmissible evidence.

12 *See also, Colina v. State,* 570 So.2d 929 (Fla. 1990)(harmless error at guilt phase in prohibiting defendant to testify regarding codefendant's statement in conjunction with impermissible argument pertaining to lack of remorse at penalty phase held not to be harmless error at penalty phase); *Dudley v. State,* 545 So.2d 857 (Fla. 1989)(harmless error at guilt phase in permitting witness to testify that defendant said "I did it" not considered harmless as to penalty phase); *Derrick v. State,* 581 So.2d 31 (Fla. 1991)(harmless error at guilt phase allowing witness to say that defendant told he would kill again, not harmless as to penalty).

one is not necessarily harmless as to the other,...*Id,* at 115.

Remand may also be necessary if the jury has been precluded from considering a mitigating factor because the trial court refused to instruct on a particular factor. *Stewart v. State,* 558 So.2d 416 (Fla. 1990). In essence, the Florida Supreme Court will order a new "sentencing hearing," before a judge and new jury, if the harmful error skewed the entire sentencing process, i.e., *Jones; Omelus.*[13]

If the error significantly altered the balance of the remaining aggravating and mitigating factors the court will remand for reweighing by the sentencing judge. *Santos v. State,* ___ So.2d ___ (Fla. September 26, 1991) 16 F.L.W. S633 (striking of aggravating factors coupled with trial court's failure to find valid mitigating evidence requires resentencing before a judge without a new jury).[14]

Sochor claims that the Court did not properly consider the "effect" the impermissible aggravating factor of "cold, calculated and premeditated" had on the jury's

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13 In *Hitchcock v. Dugger,* 481 U.S. 393 (1987) this Court found an Eighth Amendment violation due to a *Lockett* error. In this unanimous opinion, the Court opined that "no harmless error" was offered by Respondent, nor was it argued that the error "had no effect on the jury or the sentencing judge." 481 U.S. 399.

14 A review of the cases herein illustrate that when a "substantial" number of aggravating factors have been found invalid or it cannot be ascertained whether the trial court considered valid mitigating evidence presented, remand without a jury is sufficient. *Lamb v. State,* 532 So.2d 1051 (Fla. 1988); *Schaffer v. State,* 537 So.2d 988 (Fla. 1989); *Cook v. State,* 542 So.2d 964 (Fla. 1989); *Gafford v. State,* 387 So.2d 33[illegible]Fla. 1980); *Randolph v. State,* 463 So.2d 186 (Fla. 1984). *Foster v. State,* 436 So.2d 56 (Fla. 1983); *Mines v. State,* 390 So.2d 332 (Fla. 1980); *Peavy v. State,* 442 So.2d 200 (Fla. 1983); *Ferguson v. State,* 417 So.2d 631 (Fla. 1982); *Moody v. State,* 418 So.2d 989 (Fla. 1982).

recommendation.[15] Amicus Curiae for the Capital Collateral Representative of the State of Florida characterizes the jury as the *de facto* sentencer. Consistent with Sochor's reliance on the *Tedder* standard and on the number of override cases reversed by the Florida Supreme Court, Amicus and Sochor contend that the jury's recommendation is binding on the trial court, consequently the jury is the real sentencer in Florida.

The question redounds, who is the sentencer in Florida? The Florida Legislature created § 921.141(2), Fla.Stat., which states the trial court is the sentencer. The decisions

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15 There is no constitutional requirement that any particular deference must be afforded, a jury's sentencing recommendation: "Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory." *Spaziano v. Florida,* 468 U.S. 477, 465 (1984). Moreover, in *Clemons* this court rejected the notion that a jury recommendation with accompanying factual findings is required to ensure adequate appellate review. *Id.,* 108 L.Ed.2d at 739.

of the Florida Supreme Court and this Court hold that the trial judge is the sentencer.[16]

In *Parker v. Dugger,* 498 U.S. ___, 112 L.Ed.2d 812, 821-822 (1991), the Court reviewed Florida's death penalty statute (in a judicial override case) and concluded that the trial court is the sentencer pursuant to § 921.141, Fla.Stat.

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16 In *Dobbert v. Florida,* 432 U.S. 282, 295-296 (1977) the Court characterized the *Tedder* standard as illustrative that appellate review of death sentences is not perfunctory. To suggest *Tedder* alters the sentencing scheme beyond that permitted by law is inaccurate and not supported by any authority.

Interestingly, the Court in *Proffitt* concluded any "arbitrariness or capriciousness" was minimized given the fact that at the time the Florida Supreme Court had vacated eight of the twenty-one capital cases it had reviewed. *Proffitt,* 428 U.S. at 253. Of those eight cases reversed by the Florida Supreme Court, one was reversed for failure to impanel a jury for the sentencing phase. *Lamadline v. State,* 303 So.2d 17 (Fla. 1974). Of the remaining seven, five were override cases. *Thompson v. State,* 328 So.2d 1 (Fla. 1976); *Tedder v. State,* 322 So.2d 908 (Fla. 1975); *Swan v. State,* 322 So.2d 485 (Fla. 1975); *Slater v. State,* 316 So.2d 539 (Fla. 1975); *Taylor v. State,* 294 So.2d 648 (Fla. 1974). The fact that five of seven cases overturned by the Florida Supreme Court were override cases did not move this Court to elevate the jury's advisory status to that of sentencer.

The Florida Supreme Court has continually reaffirmed that the jury renders a sentence recommendation only. *Grossman v. State,* 525 So.2d 833, 840 (Fla. 1988)(Florida Supreme Court rejects defendant's characterization of the jury as the *de facto* sentencer regardless of the number of override cases reversed by the court); *Rogers v. State,* 511 So.2d 526 (Fla. 1987)(Florida Supreme Court rejected defendant's argument that the trial court gave undue weight to the jury's death recommendation. "Trial court is required to make an independent determination regarding imposition of sentence"); *Smalley v. State,* 546 So.2d 720 (Fla. 1989)(trial court as the sentencer is required to make written factual findings); *Ross v. State,* 386 So.2d 1191, 1197 (Fla. 1980)(regardless of the jury's recommendation, death or life, the trial court must make an independent determination regarding factual findings to support its sentencing determination.

Furthermore, interpretation of state law by a state's highest court is binding on the federal courts. *Goode v. Wainwright,* 464 U.S. 78, 84 (1983).

Indeed, this Court has repeatedly rejected challenges to Florida's death sentencing scheme which " 'provides for sentencing by the judge, not the jury.' *Hildwin v. Florida,* 490 U.S. ___, 104 L.Ed.2d 728, 109 S.Ct. 2055 (1989); *Spaziano v. Florida,* 468 U.S. 447, 82 L.Ed.2d 340, 104 S.Ct. 3154 (1984); *Proffitt v. Florida,* 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976)...." Walton v. Arizona, 111 L.Ed.2d at 524. *See also Barclay v. Florida,* 463 U.S. 939, 952-953 (1983).

Sochor points to no state authority which concurs with his contention that in Florida, the jury that makes a "sentencing recommendation,"[17] is the true sentencer, rather than the trial court who, pursuant to the statute, § 921.141(3), Fla.Stat.:

> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its finding upon which the sentence of death is based as to the facts:
>
> (a) that sufficient aggravating circumstances exist as enumerated in §§ (5), and
>
> (b) that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

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17 There is no provision in the Florida Statutes or by case decision that would permit the jury's recommended sentence *alone* to constitute the "sentence" in a given case. Moreover, § 921.141, Fla.Stat., specifically allows a defendant to "waive" a jury's recommended sentence, and notably absent from the statute is any language that provides the "recommendation" is binding on the true sentencer, the trial judge.

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in §§ (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment in accordance with § 775.082.

In *Walton v. Arizona,* 111 L.Ed.2d at 524-525, the Court, in reviewing Walton's comparison of Arizona's death penalty statute with that of Florida's, observed:

> ...It is true that in Florida the jury recommends the sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's finding of fact with respect to sentencing issues than does a trial judge in Arizona.

Likewise, in *Walton v. Arizona, supra,* this Court reviewed a similar challenge that the Arizona scheme would be constitutional only if a jury decides what the sentence should be. In rejecting the need for jury sentencing over sentencing by a trial judge, the court found that neither Arizona's nor Florida's death sentencing schemes substituted the jury for the trial judge as the sentencer. Sochor makes no valid attempt to demonstrate otherwise. At best, he can only point to cases where the jury has provided a life recommendation and the trial court overrides the recommendation and imposes death. Because the Florida Supreme Court utilizes its *Tedder* standard, *Tedder v. State,* 322 So.2d 908 (Fla. 1975); or the Florida Supreme Court notes the importance of the jury's recommendation in Florida's trifurcated capital

sentencing scheme, *Riley v. Wainwright,* 517 So.2d 656, 659 (Fla. 1987); or the jury is traditionally depicted as the conscious of the community and makes a statement about the appropriateness of the sentence to be imposed, *Mann v. Dugger,* 844 F.2d 1446, 1454 (11th Cir. 1988) *(en banc), cert. denied,* 489 U.S. 1071 (1989); or that the *Tedder* standard applies regardless of whether the jury recommended death or life imprisonment, *Grossman v. State,* 525 So.2d 833, 840, n.1 (Fla. 1988), does not make the jury "the sentencer" under Florida's capital sentencing scheme.

For example, in *Christopher v. State,* 583 So.2d 642, 646 (Fla. 1991), the Florida Supreme Court, in spite of a jury's recommendation of death by a vote of 9-3, imposed a life sentence because the trial court did not make contemporaneous written findings in Christopher's case per § 921.141(3), Fla.Stat., citing *Grossman v. State,* 525 So.2d 833, 841 (Fla. 1988). Similarly, in *Bouie v. State,* 559 So.2d 1113, 1116 (Fla. 1990), the court held:

> ...Trial courts have been given considerable leeway in the timely filing of written findings which demonstrate the weighing of facts and the independent exercise of reasoned judgment needed to support a death sentence. (cites omitted)....Because of the absence of the requisite findings, we therefore follow the statutory mandate and reduce Bouie's sentence to life imprisonment with no possibility of parole for twenty-five years. *See Grossman v. State,* 525 So.2d 833, 841 (Fla. 1988), *Stewart v. State,* 549 So.2d 171 (Fla. 1989).

In other words, no matter that the jury's recommendation is death, the failure by the trial court to make written findings of fact setting forth aggravating and mitigating circumstances justifying a sentence of death, requires a life

sentence be imposed.[18] Moreover, in those circumstances where judicial overrides are sustained, the Florida Supreme Court has observed in applying the *Tedder* standard:

> A judge's override is not improper simply because a defendant can point to some evidence established in mitigation. In *Tedder,* this Court held that 'in order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' *Tedder,* 322 So.2d at 910.

Zeigler v. State, 580 So.2d 127, 131 (Fla. 1991). The Court further concluded:

> In this case, the evidence in mitigation is minuscule in comparison with the enormity of the crimes committed. The defendant not only murdered his own wife in order to obtain insurance proceeds on her life but also murdered three other people in an elaborate plan to cover up his guilt. We agree that virtually no reasonable person could differ as to the appropriateness of the death sentence in this case.

580 So.2d at 131.

Sochor's reference to this Court's earlier decision in *Baldwin v. Alabama,* 472 U.S. 372, 382 (1985), does not stand for the proposition so articulated. He suggests that

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18 In *Hoffman v. State,* 474 So.2d 1178 (Fla. 1985), the Florida Supreme Court held that no error occurred where the trial court found the aggravating factor of heinous, atrocious or cruel applicable, although the jury was never given said instruction.

Additionally, in those cases where the jury recommends death *and* the trial court imposes a life sentence, the "sentence" is life.

any errors with regard to instructions given the jury cannot be "cured" by the trial court's findings or the appellate court's review because "the trial judge's findings and weighing were [not] independent of the flawed penalty verdict [the jury's recommendation]," citing *Baldwin,* n.39, p.41:

> Thus, this case does not present the question of whether a truly independent sentencing determination by the judge might satisfy *Clemons* and *Walton. See Baldwin v. Alabama,* 472 U.S. 372, 382 (1985) (erroneous jury recommendation irrelevant since court gave no deference to it, noting result might be different if, as in Florida, 'the judges were obligated to give some deference' to tainted recommendation).

(Sochor's Brief, page 41, n. 39).

In *Baldwin,* the Court noted that under the Alabama scheme the jury was required to impose a "mandatory" sentence of death once they convicted the defendant of homicide without hearing any evidence in mitigation. (Of course Alabama's sentencing procedure has since been changed and is closer to Florida's statute. *See Ala. Code 13A-5-49.)*

> ...This Court has stated that a death sentence based upon consideration of 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religious or political affiliation of the defendant,' would violate the Constitution. (cite omitted). Relying upon *Zant,* petitioner contends that, because the jury's mandatory 'sentence' would be unconstitutional standing alone, it is an impermissible fact for the trial judge to consider, as the statute appears to require, in the sentencing process. That argument conceivably might

> have merit if the judge actually were required to consider the jury's 'sentence' as a recommendation as to the sentence the jury believed would be appropriate, (cite omitted) and if the judge were obligated to accord some deference to it....

472 U.S. at 382.

Clearly, the constitutional infirmities discussed in *Baldwin* are not the circumstances herein presented.

Sochor has failed to articulate any rational basis upon which this Court could conclude that, under Florida's sentencing scheme, the jury, rather than the trial judge, is the sentencer. He has not distinguished the Florida experience from that of Arizona, nor has he shown that the conclusions drawn in *Walton v. Arizona, supra,* regarding Florida's death penalty statute are incorrect as to "who" the sentencer is in Florida.

In Sochor's case, the Florida Supreme Court found that the striking of one, of four, aggravating factors where no mitigation was found did not require "resentencing" nor was the imposition of death disproportionate. [19] *Sochor,* 580 So.2d at 604. Sochor challenged three of the four aggravating factors, 580 So.2d 595, 603 (Fla. 1990). The Court affirmed the existence of the aggravating factor that the murder was committed during the course of a kidnapping or sexual battery. *Sochor,* 580 So.2d at 603.[20]

Sochor admitted in his confessions that he killed Patricia Gifford during the course of her struggle to ward off his sexual advances. JA 118-124, 138-146. This testimony is corroborated by the testimony of his brother, Gary Sochor. JA 37-39.

The Court also affirmed the finding that the murder was especially heinous, atrocious, and cruel. *Id.* at 603. Sochor's brother testified that when the car stopped, Sochor got out of the truck. The next thing Gary stated was that Patricia was screaming for help and she begged for her life. JA 36-38, 92-92. Gary saw Sochor on top of Patricia. Gary tried to stop Sochor and in fact, threw a rock at his brother to make him stop. JA 37. Sochor also admitted to a cell-mate that Gary tried to stop him. Traces of blood and scratch marks were found on the passenger's side of the truck consistent with Sochor's confession that a struggle ensued. He admitted he had scratches all over his face. JA 139.

Testimony from Dr. Wright, the county medical examiner, fortified the finding that strangulation death is applicable to the heinousness factor. *Id.* at 603. Death by choking is caused from a breaking, tearing, or bending of the neck structure. JA 212. There is fear associated with strangulation due to the gradual inability to breathe. JA 212. Moreover, if the victim struggled, unconsciousness would occur after four minutes. JA 216.

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19 Florida's sentencing scheme affords more protection and safeguards than is constitutionally required. Proportionality review, although not constitutionally mandated, *Pulley v. Harris,* 465 U.S. 37 (1984), is a requirement in appellate review under Florida law. *Tillman v. State,* 16 F.L.W. S674 (Fla. October 17, 1991).

Evidence of collateral crimes where no conviction has been obtained is inadmissible in the sentencing phase of a capital case under Florida law, *Burr v. State,* 550 So.2d 444 (Fla. 1989), regardless of the fact that no such constitutional impediment exists. *Dowling v. United States,* 493 U.S. 342 (1990).

20 In contrast to what this Court said in *Parker v. Dugger,* 498 U.S. at __, 112 L.Ed.2d at 825, in the instant case there is no evidence that the Florida Supreme Court misread the trial judge's findings or mischaracterized them.

Although Sochor did not challenge the sufficiency of the evidence with respect to his convictions of prior violent felonies, the nature of those crimes was introduced by the state at the penalty phase.[21]

The Florida Supreme Court did find insufficient evidence to sustain the aggravating factor § 921.141(5)(i), Fla.Stat., that the murder was "cold, calculated and premeditated." 580 So.2d at 603. The evidence of "heightened" premeditation was not proven beyond a reasonable doubt. The killing resulted from the victim's resistance to Sochor's sexual advances, not a pre-planned desire to kill. *Id.* at 6[illegible].

In reviewing the trial court's findings regarding the absence of mitigation, the Court properly refused to second-guess the trial court's written order, *citing to Stano v. State,*

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21 Testimony was admitted regarding Sochor's prior sexual batteries. The first sexual battery was committed in August 1979 in Michigan. A fugitive from Michigan at the time of this rape, Sochor met a girl in a bar and asked her for a ride home. He made sexual advances to her in the car which she resisted. He choked her into unconsciousness. When she awoke she was naked and Sochor was in the act of raping her. After raping her in the car, he took the victim back to his apartment where he raped her two more times. (R 976). Sochor has admitted this rape. (R 982-986).

The second sexual battery occurred in Fort Lauderdale on March 14, 1980. (R 990). The victim upon leaving a bar saw a man [Sochor] lying on the ground. He said something to her but she continued to walk to her car. (R 992). Sochor came from behind her and forced his way into her car. He held onto her as she drove to a secluded area of town. He forced her out of the car and into an abandoned camper shell. (R 993-994). He then ripped off her clothes and repeatedly raped her vaginally, anally and orally. (R 994). During the attack Sochor became angry with the victim because he could not ejaculate. He viciously bit her breast and vagina. (R 994-995). Throughout the attack he threatened to stab her and cut her breasts. (R 992-995). Sochor confessed to this rape as well. (R 981-985).

Sochor's former wife testified that Sochor became violent if denied sex. He had previously assaulted her during these sexual episodes on at least thirty occasions. Sochor's propensity for violence was readily apparent regardless of whether he was consuming alcohol. (R 954-955).

460 So.2d 890 (Fla. 1984), *cert. denied,* 471 U.S. 111 (1985). *Id.* at 603-604.[22]

Consistent with *Rose v. Clark,* 478 U.S. at 582, *Clemons* 108 L.Ed.2d at 742, the Florida Supreme Court found the striking of one aggravating factor under these circumstances harmless, citing *Robinson v. State,* 574 So.2d 108 (Fla. 1991)(weighing process not affected by striking one aggravating factor when there remained four valid aggravators and "little" in mitigation); *Holton v. State,* 573 So.2d 284 (Fla. 1990)(striking one of four aggravating factors compared with mitigating evidence that defendant is a drug addict and a parent was harmless beyond a reasonable doubt); *James v. State,* 453 So.2d 786 (Fla.), *cert. denied,* 469 U.S. 1098 (1984)(reversal not required where there remained three valid aggravating factors and nothing in mitigation after striking one aggravating factor); *Francois v. State,* 407 So.2d 85 (Fla. 1981), *cert. denied,* 458 U.S. 1152 (1982)(although three aggravating factors were struck, there remained four valid factors with nothing in mitigation).

The Court also conducted a proportionality review, relying on similar cases where death occurred as a result of strangulation following a sexual battery, *Tompkins v. State,* 502 So.2d 415 (Fla. 1986); *Doyle v. State,* 460 So.2d 353 (Fla. 1984); *Hitchcock v. State,* 578 So.2d 685 (Fla. 1990) and held Sochor's "sentence of death proportionate to his crime." 580 So.2d at 604.[23]

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22 *Eddings v. Oklahoma,* 455 U.S. 104 (1982)(weight to be given mitigating evidence is within the sentencer's discretion).

23 The Court found none of Sochor's other claims to be meritorious and specifically found others to be procedurally barred especially trial and penalty phase jury instructions. 580 So.2d at 602-603.

II. THE AGGRAVATING FACTOR OF "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" HAS BEEN SUFFICIENTLY DEFINED TO SATISFY THE REQUIREMENTS OF *MAYNARD v. CARTWRIGHT*, 486 U.S. 356 (1988); AND *WALTON v. ARIZONA*, 497 U.S. ____, 111 L.Ed.2d 511 (1990).

Sochor contends that Florida's aggravating circumstance of "especially heinous, atrocious or cruel", § 921.141(5)(h), Fla.Stat., is unconstitutionally vague on its face and as applied to him.[24] In reaching this conclusion, Sochor asserts

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24 The record below reflects Sochor did not preserve this issue at trial and therefore he was precluded from asserting the "heinous, atrocious and cruel" [hereinafter cited as HAC] argument before the Florida Supreme Court on direct appeal. In *Sochor v. State*, 580 So.2d 595, 602, 603, n.10 (Fla. 1991), the court held that "[n]one of the complained-of jury instructions were objected to at trial, and, thus, they are *not preserved for appeal.*" The court further observed "[i]n any event, Sochor's claims here have no merit."

The Florida Supreme Court routinely applies procedural bar to claims not preserved at trial. The court, citing to *Vaught v. State*, 410 So.2d 147 (Fla. 1982), so held *sub judice*, and has not deviated from this practice as it would apply to the failure to "provide the jury with complete instructions on aggravating and mitigating circumstances in that the instructions did not reflect the refinements provided by the decisions of this Court. Since Appellant made no objection to the instructions below, this point may not be raised on appeal." 410 So.2d at 150. *See also* Fla.R.Crim.P. 3.390(d) and *McCaskill v. State*, 344 So.2d 1276 (Fla. 1977); *Gunsby v. State*, 574 So.2d 1085, 1089 (Fla. 1991) (felony murder instruction given-no evidence to support-no objection-not preserved); *Clark v. State*, 363 So.2d 331, 333 (Fla. 1978), (unless error amounts to fundamental error [*Ray v. State*, 403 So.2d 956, 960 (Fla. 1981)] objection at trial necessary to preserve claim for appellate review.) *Bottoson v. State*, 443 So.2d 962 (Fla. 1983); *Ford v. Wainwright*, 451 So.2d 471 (Fla. 1984).

Rule 3.390(d), Fla.R.Crim.P. provides in material part:

> No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict....

that the instruction used in his case violates *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Shell v. Mississippi*, 498 U.S. ____, 111 S.Ct. 313 (1990), if, in Florida, the jury is the actual sentencer. If the jury is not the actual sentencer but rather, as provided by 921.141, Fla.Stat., the trial judge is the sentencer, Sochor argues his sentence violates *Walton v. Arizona*, 497 U.S. ____, 110 S.Ct. 3047 (1990), because the trial court *sub judice* and the Florida Supreme Court, in a number of decisions, has long deviated from the narrowing construction affirmed in *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion). He contends the trial court did not employ the "*Proffitt* construction" and the Florida Supreme Court did not make its own determination or apply

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Beyond peradventure, the Florida Supreme Court, in *Sochor*, determined that the jury instruction issue "that HAC was improper" was procedurally barred. Only alternatively, did the court note in passing that the claim had "no merit", and was then rejected without discussion." 580 So.2d at 603. Sochor conceded this fact in his reply brief in the Florida Supreme Court.

The claims of whether Florida applies its HAC aggravating factor in a constitutional manner based on the instruction given, is not properly before the Court since it was not preserved below. The *only* question preserved by Sochor on appeal was whether the HAC aggravating factor was proven beyond a reasonable doubt. The Florida Supreme Court concluded that the "evidence also supports finding that the murder was especially heinous, atrocious or cruel...." 580 So.2d 603.

Terminally, Sochor's insistence that the Florida Supreme Court abandoned the need for a timely objection to the instruction with specificity is not supported by the court's decision in *Smalley v. State*, 546 So.2d 720, 722 (Fla. 1989). The court concluded, although *not preserved* in that case, that the issue should be put to "rest" for all cases.

a harmless error analysis. Sochor specifically asserts that the aggravating factor of "heinous, atrocious or cruel" is applied in a standardless, erratic fashion and therefore, its application in Florida is unconstitutional.[25]

A statute is vague and therefore in violation of the Eighth Amendment if it fails to adequately inform the sentencing body "what [it] must find to impose the death penalty." *Maynard v. Cartwright,* 486 U.S. 356 (1988). Sochor points to *Maynard* and argues that the Florida Supreme Court has failed to set forth a standard by which it evaluates the appropriateness of a trial court's finding that a murder is

25 The heinous, atrocious, or cruel aggravating factor has always been a part of Florida's "statutory aggravating factor" list. The Florida Legislature in drafting this "catchall" provision no doubt intended to insure that only the most egregious of murders would qualify, and indeed, that result is borne out by the nature of the murders for which death is ultimately imposed. *See: Hoffman,* ***On the Perils of Line Drawing: Juveniles and the Death Penalty,*** 40 Hastings Law Journal 229, 278-279 (1989).

heinous, atrocious or cruel.[26] Sochor contends that if the trial judge is the sentencer in Florida, *Walton, supra,* is violated under Florida's sentencing scheme because the application of the aggravating circumstance of heinous, atrocious or cruel, has long deviated from the narrowing construction ratified in *Proffitt v. Florida,* 428 U.S. 242 (1976) and because the trial court, as well as the Florida Supreme Court, did not employ a narrowing construction. In sum, he concludes that there is no standard as mandated by *Walton* and thus the application of heinous, atrocious or cruel in Florida is unconstitutional.

26 Respondent has reviewed 469 direct appeal decisions rendered in capital cases by the Florida Supreme Court between January 1980 and January 1992. (Appendix A). To be sure these numbers only represent the tip of the iceberg of the number of homicides that were committed and prosecuted in Florida during this same period. As a result of the review undertaken it becomes quite apparent, early on, that there has "always" been a winnowing of the "heinous, atrocious, or cruel" factor in Florida by both the trial judges in their findings of aggravation to support the death penalty and the Florida Supreme Court in its appellate role.

No specific statistical data has been generated however, because the information was gleaned from reported Supreme Court decisions and no attempt was made to review the records for specific facts not reported in the decisions. In most instances where a new trial was ordered, the Florida Supreme Court did not discuss the penalty phase of a given case. In judicial override opinions where a life sentence was imposed by the Florida Supreme Court, the court has not always fully discussed the aggravation found by the trial court since the emphasis or focus normally is directed toward what mitigation should have been found or "could" have been found by the trial court in light of the jury's recommendation.

The amicus brief of The Volunteer Lawyers Resource Center of Florida, Inc., provides an appendix at the end of their pleading which cites per year those cases where the "trial court" found HAC. The amicus does not explain whether in the cases cited by year, the Florida Supreme Court concurred with said findings. In determining whether a narrowing standard is used, one necessarily must also look to the cases where the factor was or was not found and why. Respondent's appendix attempts to set forth the information contained in the Supreme Court's decision as to the trial court's findings and the Supreme Court's review as to whether HAC was upheld.

In *Lewis v. Jeffers,* 497 U.S. ____, 111 L.Ed.2d 606, 622 (1990), the Court summarized its decision in *Walton* as follows:

> ...Walton thus makes clear that if a state has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the state has applied that construction to the facts of the particular case, then the 'fundamental constitutional requirement' of 'channeling and limiting'...the sentencer's discretion in imposing the death penalty,' *Cartwright,* 486 U.S. at 362, 100 L.Ed.2d 372, 108 S.Ct. 1853, has been satisfied....

This Court, in *Walton,* faced with a similar challenge to the instant claim, noted:

> *Maynard v. Cartwright* and *Godfrey v. Georgia,* however, are distinguishable in two constitutionally significant respects. First, in both *Maynard* and *Godfrey,* the defendant was sentenced by a jury and the jury either was instructed only in the bare terms of the relevant statute or in terms nearly as vague. (cites omitted). Neither jury was given a constitutional limiting definition of the challenged aggravating factor. Second, in neither case did the state appellate court, in reviewing the propriety of the death sentence, purport to affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented. (cite omitted). These points were critical to the conclusion we reached in *Maynard.* (cite omitted). They are equally critical to our decision in this case.

111 L.Ed.2d at 528.

Florida, like Arizona, requires the trial judge to sentence. Distinguishing both Oklahoma's and Georgia's death penalty schemes the Court held:

> [B]ut the logic of those cases has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions. If the Arizona Supreme Court has narrowed the definition of the 'especially heinous, cruel or depraved' aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor. Moreover, even if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in *Clemons v. Mississippi,* 494 U.S. ____, 108 L.Ed.2d 725, 110 S.Ct. 1441 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

111 L.Ed.2d at 528.

The Court went on to note:

> The Arizona Supreme Court's construction also is similar to the construction of Florida's 'especially heinous, atrocious or cruel' aggravating circumstance that we approved in *Proffitt v. Florida,* 428 U.S. at 255-256, 49 L.Ed.2d 913, 96 S.Ct. 2960. Recognizing that the proper degree of definition of

> an aggravating factor of this nature is not susceptible of mathematical precision, we conclude that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient because it gives meaningful guidance to the sentencer. Nor can we fault the state court's statement that a crime is committed in a 'especially depraved' manner when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing. *See* 159 Ariz. at 587, 769 P.2d at 1033.

111 L.Ed.2d at 529.

In *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, 924-925 (1976), the Court affirmed the Florida Supreme Court's interpretation of especially heinous, atrocious or cruel found in *State v. Dixon,* 283 So.2d 1, 9 (Fla. 1973).[27] The Court further noted in footnote 12:

> The Supreme Court of Florida has affirmed death sentences in several cases, including the instant case, where this eighth statutory aggravating factor was found, without specifically stating that the homicide was 'pitiless' or 'torturous' to the victim. *See, e.g., Hallman v. State,* 305 So.2d 180 (1974) (victim's throat slit with broken bottle); *Spinkellink*

27 *Maynard v. Cartwright, supra,* in *Walton v. Arizona,* 111 L.Ed.2d at 529, citing the Court "expressed approval of a definition that would limit Oklahoma's 'especially heinous, atrocious, or cruel' aggravating circumstance to murders involving 'some kind of torture or physical abuse,'..." The court went on to state that "such a construction was not the only one 'that would be constitutionally acceptable,'" and then noted that Arizona's aggravating circumstance "is virtually identical" to the one approved of in Oklahoma.

> *v. State,* 313 So.2d 666 (Fla. 1975) ('career criminal' shot sleeping traveling companion); *Gardner v. State,* 313 So.2d 675 (Fla. 1975) (brutal beating and murder); *Alvord v. State,* 322 So.2d 533 (Fla. 1975) (three women killed by strangulation, one raped); *Douglas v. State,* 328 So.2d 18 (Fla. 1976) (depraved murder); *Henry v. State,* 328 So.2d 430 (Fla. 1976) (torture murder); *Dobbert v. State,* 328 So.2d 433 (Fla. 1976) (torture and killing of two children). *But the circumstances of all of these cases could accurately be characterized as 'pitiless' and 'unnecessarily torturous,' and it thus does not appear that the Florida court has abandoned the definition that it announced in* ***Dixon*** *and applied in* ***Alford, Tedder,*** *and* ***Halliwell.***

Proffitt v. Florida, 49 L.Ed.2d at 924-925. (emphasis added).

Indeed, the Florida Supreme Court has steadfastly relied on its "polestar" decision[28] in *State v. Dixon, supra,* regarding the application of this aggravating factor.[29] In *Lewis v. State,* 398 So.2d 432, 438 (Fla. 1981), the Florida Supreme Court opined:

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28 In *State v. Gretzler,* 659 P.2d 1 (Ariz. 1983), Arizona's seminal decision regarding the "especially heinous, atrocious, cruel or depraved" aggravating factor, the Court prescribed certain characteristics that could make up this factor. Lower courts were to be guided by these factors but not compelled to specifically address each. In *Gretzler, supra,* factors indicating heinousness or depravity were 1) relishing the murder; 2) infliction of gratuitous violence above that necessary to complete objectives of the crime; 3) mutilation of the corpse; 4) senselessness of crime, and 5) helplessness of the victim.

With regard to the "cruelty" aspect of this factor, the *Gretzler* court concluded that it must be proven beyond a reasonable doubt the victim consciously suffered mental anguish or physical pain prior to death. *State v. Gretzler,* 659 P.2d at 10.

This Court, in *Walton v. Arizona,* 111 L.Ed.2d at 529, had no particular difficulty in concluding Arizona had "a proper degree of definition of an aggravating factor "because it" gives meaningful guidance to the sentencer...."

Similarly, the Florida Supreme Court has produced a body of caselaw based on the teachings of *State v. Dixon, supra,* and *Proffitt, supra,* which constitutes a "proper degree of definition" to give "meaningful guidance to the sentencer."

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29 *Proffitt v. Florida, supra,* set into stone the *State v. Dixon, supra,* definition. Early cases reflect, such as *Hargrave v. State,* 366 So.2d 1, 5 (Fla. 1978), that an execution-style shooting would constitute extremely wicked and shockingly evil conduct. The Florida Supreme Court later recognized in cases such as *Jones v. State,* 411 So.2d 165, 169 (Fla. 1982), that execution-style murder (shot at point blank range), might not always neatly fall within this factor.

In July 1979, 921.141(5)(i), Fla.Stat., became effective. This "evolutionary" aggravating factor carved out as a separate factor more closely addresses the "one shot", execution-style murder. *See Pope v. State,* 441 So.2d 1073, 1077-1078 (Fla. 1983). Specifically, 921.141(5)(i), provides:

> (i) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The Florida Supreme Court, in *Rogers v. State,* 511 So.2d 526 (Fla. 1987), refined this factor even more narrowly. *See Banda v. State,* 536 So.2d 221 (Fla. 1988); and *Dougan v. State,* ____ So.2d ____ (Fla. January 2, 1992), 17 F.L.W. S10, wherein the court found both HAC and cold, calculated and premeditated aggravating factors proven beyond a reasonable doubt. The facts found by the court reflect:

> Eventually, the five men [Dougan included] drove towards Jacksonville Beach, where they picked up a white hitchhiker, 18-year-old Stephen Anthony Orlando. Against Orlando's will and over his protest, they drove him to an isolated trash dump, ordered him out of the car, stabbed him repeatedly, and threw him to the ground. As the 18-year-old youth writhed in pain and begged for his life, Dougan put his foot on Orlando's head and shot him twice — once in the chest and once in the ear — killing him instantly.

Dougan, slip opinion, page 3.

The Court noted that Dougan bragged about the murder — he made tape recordings and sent the recordings to the victim's family and media. The Court concluded:

> The facts also set this murder apart from the norm of killing by illustrating the victim's suffering and Dougan's indifference to the victim's pleas and support finding the heinous,

The trial court judge based his finding that the murder was heinous, atrocious and cruel on the fact that the murder was premeditated, cold and calculated, and stealthily carried out. Early in the history of the capital felony sentencing law, this Court provided an interpretation of this statutory factor. 'What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crimes apart from the norm of capital felonies — the consciousless or pitiless crime which is unnecessarily torturous to the victim.' *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Under this standard, a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious or

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atrocious, or cruel aggravator. *Cf. Ponticelli v. State*, No. 73,064 (Fla. October 10, 1991), and cases cited therein. Finally, the planning and execution of this murder demonstrates the heightened premeditation needed to find it had been committed in a cold, calculated and premeditated manner. *Cf. Cruse v. State*, No. 74,656 (Fla. October 24, 1991); *Rogers*. As discussed later, Dougan had no colorable claim of any moral or legal justification for this killing.

Dougan, slip opinion, page 9.

In *In Re Standard Jury Instructions Criminal Cases*, No. 90-1, 579 So.2d 75 (Fla. 1991), the Supreme Court Committee on Standard Jury Instructions (Criminal) again reinforced the jury instruction governing HAC in providing:

> The committee has decided that the additional language, which is based on *State v. Dixon*, 383 So.2d 1 (Fla. 1973), improves the instruction and that it adequately addresses any problem the paragraph may present in light of *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

> cruel. (cites omitted). We hold, therefore, that the finding of this factor was erroneous.

398 So.2d at 438.

In *Clark v. State*, 443 So.2d 973, 977 (Fla. 1983), citing *State v. Dixon, supra*, the court found that the murder therein was not especially heinous, atrocious or cruel, in spite of the fact that the Court noted helpless anticipation of impending death may serve as a basis for this factor. The Court found no evidence to prove Mrs. Sattey "knew more than an instant" what was about to happen to her. *See also Gorham v. State*, 454 So.2d 556, 559 (Fla. 1984), (while murder unjustified, no evidence of "prolonged or torturous captivity"); *Bundy v. State*, 471 So.2d 9 (Fla. 1985), (absent evidence twelve-year-old female victim "struggled with abductor, experienced extreme fear or apprehension, or was sexually assaulted before death", it was error to find this factor); *Mills v. State*, 476 So.2d 172, 178 (Fla. 1985), (in considering this factor, "must look to the act itself that brought about the death"); *Jackson v. State*, 498 So.2d 906, 910 (Fla. 1986), citing *State v. Dixon, supra*, and *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982) (interpreting Florida law), *cert. denied*, 464 U.S. 1002 (1983).

In *Cochran v. State*, 547 So.2d 928, 931 (Fla. 1989), the Florida Supreme Court disallowed the heinous, atrocious and cruel aggravating factor, observing:

> We agree with appellant that this finding does not comport with prior decisions of this Court defining the parameters of the heinous, atrocious or cruel aggravating factor. Lack of remorse is clearly improper as an aggravating factor or enhancement of an aggravating factor. *Pope v. State*, 441 So.2d 1073 (Fla. 1983). Failure to get medical attention for the victim does not make a murder especially heinous, atrocious or cruel. *Teffeteller v. State*, 439

> So.2d 840, 846 (Fla. 1983), *cert. denied,* 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984); *Tedder v. State,* 322 So.2d 908, 910 (Fla. 1975). Nor can the defendant's acts after the victim is unconscious support this aggravating factor. (cites omitted). Our cases make clear that where, as here, death results from a single gunshot and there are no additional acts of torture or harm, this aggravating circumstance does not apply....

547 So.2d at 931.

In *Smalley v. State,* 546 So.2d 720 (Fla. 1989), the Florida Supreme Court, faced with repeated assertions that the aggravating circumstance of heinous, atrocious or cruel was unconstitutionally vague under the Eighth and Fourteenth Amendments to the United States Constitution, disregarded Smalley's failure to object and addressed the matter, "in order to set the issue at rest." 546 So.2d at 722. The court observed:

> It is true that both the Florida and Oklahoma capital sentencing laws use the phrase 'especially heinous, atrocious or cruel.' However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma, the jury is the sentencer, while in Florida, the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious or cruel.
>
> This Court has narrowly construed the phrase 'especially heinous, atrocious or cruel' so that it has a more precise meaning than the same phrase

had in Oklahoma. In *State v. Dixon,* 283 So.2d 1, 9 (Fla. 1973), *cert. denied,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), we said:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies — the consciousless or pitiless crime which is unnecessarily torturous to the victim.

It was because of this narrowing construction that

> the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious or cruel against a specific Eighth Amendment vagueness challenge in *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious or cruel to those consciousless or pitiless crimes which are unnecessarily torturous to the victim. (cites omitted). That *Proffitt* continues to be good law today is evident from *Maynard v. Cartwright,* wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. *See Maynard v. Cartwright,* 108 S.Ct. at 1859.

Smalley v. State, 546 So.2d at 722.

More recently, in *Shere v. State,* 579 So.2d 86 (Fla. 1991), the Florida Supreme Court, again citing to *Dixon,* held that the instant murder did not rise to a torturous murder that evinces extreme and outrageous depravity exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. *See Cheshire v. State,* 568 So.2d 908, 912 (Fla. 1990).

The trial courts, as well as the Florida Supreme Court, frequently find that the aggravating factor that the murder was committed in a heinous, atrocious or cruel manner is accompanied by additional acts of a pitiless nature unnecessarily torturous to the victim or victims.[30] *See Hildwin v. State,* 531 So.2d 124 (Fla. 1988), where an abduction was involved, the court has found the murder may be heinous, atrocious or cruel (victim abducted, raped, slowly strangled); *Bryan v. State,* 533 So.2d 744 (Fla. 1988) (victim kidnapped, held in fear for life for four hours, taken to isolated area, marched to creek bank where he begged not to be crippled, struck and then shot with a shotgun blast to the face); *Parker v. State,* 476 So.2d 134 (Fla. 1985) (victim told by defendant that he was going to kill her, driven seventeen miles, dragged by the hair, stabbed and shot execution-style); *Mendyk v. State,* 545 So.2d 846 (Fla. 1989) (victim kidnapped, raped and toyed with); *Preston v. State,* 444 So.2d 939 (Fla. 1984) (victim driven a mile and a half, required to walk some five hundred feet and then throat slashed); *Copeland v. State,* 457 So.2d 1012 (Fla. 1984) (victim's ordeal lasted hours, kidnapped, raped, and then shot); *Koon v. State,* 513 So.2d 1253 (Fla. 1987) (victim beaten, forced into a car, and then executed); *Swafford v. State,* 533 So.2d 270 (Fla. 1988) (victim abducted, sexually battered and then shot); *Duckett v. State,* 568 So.2d 891 (Fla. 1990) (law enforcement officer strangled and then eleven-year-old girl abducted and drowned after sexually abused).

Heinous, atrocious and cruel also may be found when beatings have occurred, resulting in the murder. *See Cherry v. State,* 544 So.2d 184 (Fla. 1989) (victim beaten and killed by blow to the head); *Chandler v. State,* 534 So.2d 701 (Fla. 1988) (elderly couple abducted from home and beaten to death in each other's presence); *Lamb v. State,* 532 So.2d 1051 (Fla. 1988) (victim sustained defensive wounds, struck

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30 Sochor points to the decision in *Vaught v. State,* 410 So.2d 147 (Fla. 1982) stating "[i]n 1982, the court disapproved narrowing *State v. Dixon,* limitations, *Vaught v. State,* (cite omitted) (specifically rejecting claim, based on State v. Dixon, that circumstance focuses on infliction of physical pain or anguish), and in 1984, it removed the constitutionally approved construction. *Pope,* 441 So.2d at 1077-78 ...." (Sochor's brief at p.44.)

Such a bold statement is unsupported by the authorities cited. In *Vaught v. State, supra,* the Court observed that a spontaneous shooting and near instantaneous death therefrom did not fall within the Court's interpretation of "mental anguish" or "physical pain." The Court concurred however, that the facts supported what *thus far* had otherwise been considered an "execution-style" or "cold calculated" murder under HAC. *Vaught,* 410 So.2d at 151. *Vaught's* crime occurred in 1977, prior to the creation of § 921.141(5)(i), Fla.Stat., (the cold, calculated premeditated murder without the pretense of legal justification).

In *Pope v. State,* 441 So.2d 1073 (Fla. 1983) the Court acknowledged the creation of § 921.141(5)(i), Fla.Stat., *Pope,* 441 So.2d at 1078, n.2, and held that a lack of remorse *was not* an independent aggravating factor "in and of itself."

> "...we hold that henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." *Pope,* 441 So.2d at 1078.

The Court acknowledged that a new jury instruction resulting from those adopted by the 1981 revised jury instructions (criminal) called for a jury instruction that "[t]he crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." "Thus we find *any* consideration of defendant's remorse extraneous to the question of whether the murder of which he was convicted was especially heinous, atrocious or cruel." 441 So.2d at 1078. (emphasis added)

six times in head with claw hammer, did not die instantaneously); *Roberts v. State,* 510 So.2d 885 (Fla. 1987) (victim sustained several blows to the head and had multiple defensive wounds); *Scott v. State,* 494 So.2d 1134 (Fla. 1986) (victim beaten, driven around and then beaten again before killed).

This aggravating factor has been sustained when fear and anguish precedes a victim's death. *See Routly v. State,* 440 So.2d 1257 (Fla. 1983); *Steinhorst v. State,* 412 So.2d 332 (Fla. 1982); *Adams v. State,* 412 So.2d 850 (Fla. 1982); *White v. State,* 403 So.2d 331 (Fla. 1981); *Francis v. State,* 473 So.2d 672 (Fla. 1985) (victim forced to crawl on knees and beg for life, placed on toilet stool for two hours, Draino injected, begged for life); *Turner v. State,* 530 So.2d 45 (Fla. 1987) (victim pursued into phone booth, cut and stabbed to death, pleas for mercy); *Morgan v. State,* 415 So.2d 6 (Fla. 1982) (ten stab wounds, victim's statement that 'I'll pay you' before he was killed demonstrated awareness of impending death); *Melendez v. State,* 498 So.2d 1258 (Fla. 1986) (victim's throat slit, shot, victim knew of impending death); *Cooper v. State,* 492 So.2d 1059 (Fla. 1986) (victim aware of impending death, bound, gun misfired three times, pleaded for life); *Huff v. State,* 495 So.2d 145 (Fla. 1986) (victim tried to block shot to face, aware that victim's own son was murderer); *Kokal v. State,* 492 So.2d 1317 (Fla. 1986) (victim marched to execution site, beaten, shot after begging for mercy); *Smith v. State,* 515 So.2d 182 (Fla. 1987) (eight-year-old brutally raped, sodomized and beaten to death with rock).

The Florida Supreme Court has also found that death as a result of multiple stab wounds can constitute a torturous, pitiless murder. *See Haliburton v. State,* 561 So.2d 248 (Fla. 1990) (victim sustained thirty-one stab wounds on cheek, neck, arms and scrotum); *Floyd v. State,* 497 So.2d 1211 (Fla. 1986) (victim lived for four minutes after being stabbed

twelve times, many defensive wounds); *Hansborough v. State,* 509 So.2d 1081 (Fla. 1987) (many of the thirty or more stab wounds were defensive wounds); *Duest v. State,* 462 So.2d 446 (Fla. 1985) (eleven stab wounds, victim languished before dying); *Lusk v. State,* 446 So.2d 1038 (Fla. 1984) (victim received three stab wounds and bled to death), and *Breedlove v. State,* 413 So.2d 1 (Fla. 1982) (victim stabbed and did not die immediately).

The Florida Supreme Court has also found this aggravating factor may be applicable where death by strangulation has occurred. *See Dudley v. State,* 545 So.2d 857 (Fla. 1989) (victim strangled and throat cut); *Adams v. State,* 412 So.2d 850 (Fla. 1982) (eight-year-old victim screaming then strangled to death); *Tompkins v. State,* 502 So.2d 415 (Fla. 1986) (not instantaneous, victim struggled and was ultimately strangled to death); *Alvord v. State,* 322 So.2d 533 (Fla. 1975) (three victims bound, sexually assaulted and strangled to death); *Deaton v. State,* 480 So.2d 1279 (Fla. 1985) (victim strangled to death with an electrical cord), and *Sochor v. State,* 580 So.2d 595 (Fla. 1991) (victim struggled, choked to death); *Holton v. State,* 573 So.2d 284, 292 (Fla. 1990):

> The victim's death by strangulation accomplished by a ligature tied around her neck was sufficient to support the finding of this factor. This Court previously has stated that it can be inferred 'that strangulation, when perpetrated on a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor heinousness is applicable.' (cites omitted).

The Florida Supreme Court has also upheld the heinous, atrocious and cruel aggravating factor where, in *Thompson v. State,* 389 So.2d 197 (Fla. 1980), (the court found that the

victim died from torture); *Harvey v. State,* 529 So.2d 1083 (Fla. 1988) (elderly victims accosted in home, overheard discussions of how they were to be killed and then shot when they tried to run away); *Buenoano v. State,* 527 So.2d 194 (Fla. 1988) (victim died from slow arsenic poison); *Way v. State,* 496 So.2d 126 (Fla. 1986) (victims set afire and burned alive as they were screaming and moving in garage), and *Lightbourne v. State,* 438 So.2d 380 (Fla. 1983) (victim suffered unnecessarily torturous death).[31]

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31 To be sure not all cases where HAC has been found by the trial court have passed appellate scrutiny. The following is merely a sample of the types of cases where HAC has failed to satisfy appellate muster. In *Rivera v. State,* 545 So.2d 864 (Fla. 1989) (police officer shot three times within 16 seconds, died immediately thereafter); *Scull v. State,* 533 So.2d 1137 (Fla. 1988) (single blow to the head); *Bundy v. State,* 471 So.2d 9 (Fla. 1985) (no evidence victim struggled or experienced fear, not sexually assaulted); *Herzog v. State,* 439 So.2d 1372 (Fla. 1983) (acts done to unconscious or semiconscious victim); *Burns v. State,* ___ So.2d ___ (Fla. May 16, 1992), 16 F.L.W. S389 (rehearing granted on another issue) (one gunshot wound-law enforcement officer-not HAC); and *Santos v. State,* ___ So.2d ___ (Fla. September 26, 1991), *reh'g denied* January 23, 1992), 16 F.L.W. S633 (domestic violence case-killed woman he lived with and their daughter-woman holding child, ran from defendant, he caught her spun her around-shot her twice, child once). The court held:

> We also agree that this crime was not heinous, atrocious, or cruel. As we recently explained in *Cheshire v. State,* 568 So.2d 908 (Fla. 1990), this factor is appropriate in torturous murders involving extreme and outrageous depravity. A murder may fit this description if it exhibits a desire to inflict a high degree of pain or an utter indifference to or enjoyment of the suffering of another. *Id.* at 912. The torture-murder in *Douglas,* which involved heinous acts extending over four hours, illustrates a case in which this factor was appropriately found. *Douglas,* 575 So.2d at 166. The present murders happened too quickly and with no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims. Accordingly, the trial court erred in finding this factor to be present.

16 F.L.W. at S634.

As observed in *Sanchez-Velasco v. State,* 570 So.2d 908 (Fla. 1990) (the first degree murder and sexual battery of a twelve-year-old girl):

> ...[w]e have previously addressed the claim that the aggravating circumstance of heinous, atrocious, or cruel is impermissibly vague and does not provide the jury with enough guidance. This Court has expressly limited the definition of this aggravating factor in our opinion in *State v. Dixon* (cite omitted). Moreover, the use of this aggravating circumstance by the trial judges, who are the actual sentencers in Florida, has been specifically approved. *See Hildwin v. State,* 531 So.2d 124 (Fla. 1988), *aff'd,* 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989). We note that the trial court not only found the aggravating circumstance of heinous, atrocious or cruel, but also expressly set forth in the record, the justification for such a finding. Further, we find that the claim that the factor was not established beyond a reasonable doubt is totally without merit. Substantial evidence was presented during the guilt and penalty phases to establish the aggravating factor, including the rape evidence, which was properly considered during the penalty phase.

Similarly, in the instant case, the trial court, armed with a standard that has existed in Florida since 1976, set forth in *State v. Dixon, supra,* concluded:

While similarities may always be found when one compares decisions, and results at first blush appear conflicting, the concerns to be addressed do not call for a perfect system or standard, rather it calls for a system or standard that is free from wanton and freakish imposition. *McCleskey v. Kemp,* 481 U.S. 279 (1987), and *Pulley v. Harris,* 465 U.S. 37 (1984).

The court finds, according to Florida Statute 921.141(5)(h), that the capital felony was especially, heinous or cruel. The evidence indicated that the victim was forcibly removed from the truck while she pleaded for help and even begged for her life. Even though Patricia Gifford's body was never recovered and no one knows how badly she was beaten, the defendant admitted in his statements that as he choked her, she resisted and fought him. There were several fingernail marks on his face which substantiates that violent struggle ensued as confirmed by the defendant's statements to the police officers. Dr. Wright testified that asphyxiation is a slow and painful death. Fear and emotional trauma preceding the victim's death may be considered as contributing to the heinous nature of the capital felony. It is clear there was fear and definitely emotional trauma before her death.

(TR 1232-1233).

The Florida Supreme Court, in concurring that this aggravating factor existed and was proven beyond a reasonable doubt, held in *Sochor v. State,* 580 So.2d at 603:

> The evidence also supports the finding that the murder was especially heinous, atrocious, or cruel. Fear and emotional strain can contribute to the heinousness of the murder. *Adams,* 412 So.2d at 857. Gary testified that the victim screamed for help after she was dragged from the truck and scratches on Sochor's face indicate that a struggle took place. The evidence supports a conclusion of horror and contemplation of serious injury or death by the victim. Moreover, Sochor confessed that he choked the victim to death. It can be inferred that 'strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear and that this method of killing is one to which the factor of heinousness is applicable.' *Tompkins v. State,* 502 So.2d 415, 421 (Fla. 1986) (citations omitted), *cert. denied,* 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987). *Accord Johnson v. State,* 465 So.2d 499 (Fla.), *cert. denied,* 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); *Doyle v. State,* 460 So.2d 353 (Fla. 1984). The trial court properly found this aggravating factor.

The trial court, as well as the Florida Supreme Court, correctly applied § 921.141(5)(h), Fla.Stat., to Sochor's case.[32]

The history of this aggravating factor and its application in Florida capital cases beyond question satisfy the guidance test announced in *Walton v. Arizona, supra.* Because Florida is a judge sentencing state, the concerns expressed in *Maynard v. Cartwright, supra,* do not exist *sub judice. Smalley v. State, supra.* There is a clear narrowing of this

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32 The jury instruction that was read provides that the aggravating factors you may consider are limited:

> 8. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(TR 221).

While pretrial, defense counsel raised some concern as to the constitutionality of a number of aspects of Florida's death penalty, *no* objection was raised at trial regarding this instruction. Albeit, defense counsel *at trial* might not have been successful in convincing the trial court to provide a more "expansive" instruction regarding the HAC instruction, we will never know. The instant case is not like *Ford v. Georgia,* ___ U.S. ___, 111 S.Ct. 850 (1991). The Respondent and the state court were entitled to a timely and specific objection as to the instruction provided. Moreover, it would appear no procedural bar plagued the issue in the *Maynard v. Cartwright* case or for that matter, *Walton v. Arizona, supra.*

aggravating factor by both the trial judges as well as the Florida Supreme Court in its appellate review. The Florida Supreme Court's conclusion that this aggravating factor was appropriately found beyond a reasonable doubt must be affirmed.[33]

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33 Terminally, Respondent would also point to the conclusion drawn in *Walton v. Arizona*, 111 L.Ed.2d at 529-530, that:

> In effect Walton challenges the proportionality of the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we lawfully may presume that [Walton's] death sentence was not 'wantonly and freakishly' imposed — and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment. (cites omitted). Furthermore, the Arizona Supreme Court plainly undertook its proportionality review in good faith and found that Walton's sentence was proportional to the sentence imposed in cases similar to his. The Constitution does not require us to look behind that conclusion.

Beyond a doubt, a similar result must be herein reached. The Supreme Court concluded that Sochor's case was proportionate and noted:

> Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing. (cites omitted). Under the circumstances of this case, and in comparison with other death cases, we find Sochor's sentence of death proportionate to his crime. *E.g., Hitchcock v. State*, 578 So.2d 685 (Fla. 1990); *Tompkins; Doyle*, 580 So.2d at 604.

See Holton v. State, 573 So.2d 284, 292 (Fla. 1990) and *Capehart v. State*, 583 So.2d 1009 (Fla. 1991) [trial court found four aggravating factor, HAC, CCP included plus one mitigating factor. Florida Supreme Court struck CCP — found HAC valid and affirmed. (victim's death caused by asphyxiation due to smothering)].

> "Ample evidence in the record regarding both the method of killing and the sexual assault and resulting internal trauma to the victim supports this circumstance. The medical examiner testified that the injuries to Reeves' sexual organs

CONCLUSION

Sochor's conviction and sentence of death should be affirmed.[34]

Respectfully submitted,

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> would have caused her pain. She also explained that death by smothering is not instantaneous, and the victim would have remained conscious for up to two minutes. During that time the victim would have experienced a foreknowledge of death as well as anxiety and fear. *Cf. Tompkins v. State*, 502 So.2d 415, 421 (Fla. 1986)(strangulation of conscious victim), *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987). Accordingly the trial court did not err in finding this circumstance."

583 So.2d at 1015.

34 Respondent has not focused on any of the alleged mitigation Sochor contends should have been found by either the trial court or the Florida Supreme Court. In accepting certiorari review, this Court declined to revisit that matter.

Case No. _____

In The

Supreme Court of the United States

October Term, 1988

DENNIS SOCHOR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX A

BRIEF ON THE MERITS IN SUPPORT OF RESPONDENT

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STATEMENT OF THE CASE

The victim, Patricia Gifford, and her friend Delta Harville went to the Banana Boat Lounge on New Year's Eve, December 31, 1981. A mutual friend, Patricia Borman was tending bar at the lounge that evening. (R 36-44). Dennis Sochor, and his brother Gary were also there and began a conversation with the two young women. (R 83). Shortly after midnight, Delta became very ill and went to the ladies' room. Patricia accompanied her. Sochor stood outside the bathroom, calling for Patricia. (R 58-59). Patricia, with the assistance of the Sochor brothers, helped Delta to the car. JA 33. She told Delta that she would go pay their bar tab and be right back out to sit with her. Patricia did paid the tab, however she thereafter was never seen again. (R 44, 89, 99).

Gary Sochor testified that after they put Delta in the car, Patricia went willingly with the Sochor brothers ostensibly to get something to eat in the borrowed truck. The next thing Gary knew, the truck stopped and Patricia was screaming for help. JA 36. Gary exited the truck and Dennis was on the ground on top of Patricia. Gary attempted to stop Dennis by throwing a rock at him. Dennis told him to get back in the truck. Patricia screamed for help and begged for her life. JA 37, 92. Dennis returned to the truck approximately five minutes later, without Patricia. Gary never saw her after that. JA 39.

The next day Gary saw articles of woman's clothing and a set of car keys in the truck. JA 43-45. The description of the clothes matched the victim's clothing from the night before. Sochor admitted that the clothes belonged to the victim. (R 109, 421) JA 122-123, 128. Sochor had several scratches or gouges on his face, (R 260, 270), and he admitted that Patricia had scratched him during the struggle. JA 128. The wounds were still visible several days after the murder.

(R 300). Gary left later that day, New Year's Day, to go back to Michigan. JA 48.

When Delta woke the next morning, New Year's Day, still in her car, she realized Patricia was missing and called the police. (R 94). A picture of Patricia with the defendant appeared in the newspaper several days later. (R 194,303). Sochor disappeared after that. (R 303). Eventually the police were led to Gary Sochor. (R 204). On January 7, 1982, Gary returned to Florida to help find the body of Patricia Gifford. (R 204, 209-213). Gary told the police what had happened on New Year's Eve. (R 387-393) JA 50.

Sochor had been using his employer's truck around the time of the murder. On January 22, 1982, that truck was found in Tampa. (R 218, 240-243) JA 32, 122. Traces of blood and scratch marks were found on the passenger side of the truck. (R 292).

The investigation remained dormant until May 1986, when Dennis was arrested in Georgia. (R 395). Gary had not seen or heard from his brother Dennis again until he was arrested in Georgia. JA 53. Dennis Sochor came back to Florida with the police (R 412), and ultimately gave three taped statements admitting that he killed Patricia Gifford. (R 436-452) JA 99-167. Sochor stated that she refused his sexual advances. When attempting to fight him off, she scratched his face, which made him angry. He then confessed to choking Patricia to death. (R 413) JA 137-143, 156-157, 164. He saw his picture in the paper after the incident, became scared, and took off in his employer's truck. JA 137.

Dr. Zager and Dr. Ceros-Livingston were called for the defense. (R 641-739). Both testified that Sochor reported a long history of drug abuse and physical abuse by his mother. (R 648-649, 653, 699). Both stated that he was not psychotic and was legally sane at the time of the incident. (R 656, 703, 717, 735,739). Both testified that Sochor has an anti-social

personality disorder, and exhibited impulsive and destructive behavior. (R 656, 733). He has average intelligence and is reality based. (R 717). There was no history of any psychiatric hospitalization. (R 703). Dr. Zager further stated that Sochor would be dangerous if released. (R 676). Dr. Ceros-Livingston stated that Sochor's test scores indicated a "fake-bad" profile, evidencing an attempt by the defendant to appear mentally ill. (R 714).

A psychiatrist called by the State, Dr. Ricardo Castillo, testified that Sochor was suffering from selective amnesia, as he had difficulty in remembering any facts which were self-incriminating. (R 798). He also stated that Sochor has an anti-social personality. (R 799).

Dennis Sochor was convicted of first degree murder on October 20, 1987. (R 944, 1185). The penalty phase then began.

The first witness called by the State was Sochor's ex-wife, Patricia Neal. JA 196. She testified that Sochor became violent if she would refuse his sexual advances, consequently she usually submitted. JA 198. Ms. Neal was physically assaulted by Sochor on at least thirty occasions. JA 198.

Dr. Wright, the county medical examiner, testified that death by choking amounted to a compression of the neck structure. JA 210. Death is usually slow and painful. JA 211, 212. The pain associated with this manner of death was caused from a breaking, tearing, or bending of the neck structure. JA 212. There is fear associated with strangulation due to the gradual inability to breathe. JA 212. If the victim struggled, unconsciousness would occur after four minutes. JA 216.

Captain Mark Schlein of the Fort Lauderdale police testified regarding Sochor's confession to two prior sexual batteries. One took place in Michigan in May 1979 and the

other one occurred in Fort Lauderdale in March 1980. JA 217-226.

Vicki Russo, a detective with the Fort Lauderdale Police Department testified regarding the facts of the two prior rapes. In both instances, the victims were seen or met at a bar. The victim from Michigan agreed to give Sochor a ride home. He made sexual advances to her in the car and she resisted. He choked her into unconsciousness. When she awoke, he was in the process of raping her. The victim was taken back to Sochor's apartment where she was raped two more times. JA 210, 221-227.

The second rape occurred in Fort Lauderdale in March 1980. As the victim was getting into her car, Sochor came up behind her and forced his way into the car with her. He then drove to a secluded area of town. He ripped her clothes off and raped her. He became violent, viciously biting her sexual organs, because he was unable to ejaculate. She was repeatedly raped and physically threatened. JA 230-235, 222-226.

The State rested its case.

Sochor presented the testimony of four family members, including his parents, a sister, and his brother Gary. JA 241-301. They all stated that Sochor, one of ten siblings, was beaten more than any of the other children. His mother would physically abuse him. JA 241, 244, 255, 270. When Sochor's father was out of work, Dennis would hand over his pay check to help support the rest of the family. JA 244.

On cross-examination, all the witnesses admitted that Sochor was a violent child when growing up. He attacked one of his brothers, Brian, so badly that the police had to be called and Brian was hospitalized. JA 261, 265. Sochor also hit both of his parents. One such beating of his father resulted in the loss of a pint of blood. JA 285-287. Sochor's

family had not seem him for eleven years prior to the murder of Patricia Gifford. JA 255, 273.

During closing, Sochor's attorney claimed that the system had failed Dennis Sochor and that he should have received help for his personality troubles a long time ago. He further urged the jury to have mercy on Sochor as the death penalty was just a continuation of the violence. He claimed that Sochor's troubles with alcohol and his violent behavior was evidence of the mitigating factors that the crime was committed while he was under extreme mental or emotional disturbance, and that his ability to conform his conduct to the requirements of the law was substantially impaired. JA 312-326.

The jury returned an advisory sentence of death by a vote of ten to two. (R 1225). The judge submitted his written findings of fact in support of the sentence of death on November 2, 1987.[1] On direct appeal Sochor presented approximately twenty-five claims of alleged error. The Florida Supreme Court found no error as to the guilt phase. *Sochor v. State*, 580 So.2d 595, 599-603 (Fla. 1991). Regarding the sentencing phase, the Court sustained the trial court's findings that no mitigating evidence was established, *Sochor*, 580 So.2d at 603-604, and sustained the findings as to the three aggravating factors, *Id.*, at 603. The Court found insufficient evidence to establish that the murder was committed with a "heightened" level of premedita-

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1 The trial court found four aggravating factors: § 921.141(5)(b), that the defendant was previously convicted of a prior violent felony; § 921.121(5)(d), that the crime was committed while the defendant was engaged in the commission of a sexual battery or kidnapping; § 921.141(5)(h), that the capital felony was especially heinous, atrocious, and cruel; and § 921.141(5)(i), the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R 1231-2133). The trial court considered and found no mitigating evidence, statutory or otherwise. JA 348-354.

tion. *Id.* The Court opined that it was more likely that Sochor committed the murder when the victim resisted his sexual advances. *Id.* The Court found that the error was harmless as that there remained three valid aggravators weighed against nothing in mitigation.[2] The convictions and death sentence were then affirmed. *Id.*[3] Sochor filed for certiorari review in this Court on September 19, 1991. The State responded on October 15, 1991. Review was granted on November 18, 1991.

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2 In conformity with Florida law, the Supreme Court then conducted a proportionality review.

3 Sochor was also convicted of kidnapping. (R 1190).

Direct Appeals Decisions by the Florida Supreme Court

The following collection of cases represents most, if not all, of the direct appeal decisions rendered by the Florida Supreme Court between January 1980 and January 1992. Listed is information pertaining to the case name and cite; the jury's recommended sentence; the trial court's sentence; whether HAC was found as an aggravating factor; whether any harmless error analysis was performed; the case disposition and the aggravating and mitigating factors found by the trial court. All information is derived from the opinions reviewed and no data is indicated where either the decision is unclear or silent.

Key:
Y = Affirmatively Found
N = Not found
O = Not Applicable
X = No Information
DP = Death Penalty
Life = Life Sentence

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Sochor v. State 580 So.2d 595 (Fla.1991)	DP	DP	Y	Y	Affirmed Death Penalty Struck CCP	Agg: prev. violent felony; HAC; CCP; committed during felony Mit: none
Owen v. State ___ F.L.W. S___ (Fla. January 23, 1992)	DP	DP	Y	Y	Affirmed Death Penalty Victim Impact Harmless; Harmless error due to wrongful reliance on conviction subsequently overturned	Agg: previously convicted felon committed during sexual battery and burglary; HAC; CCP Mit: none
Happ v. State ___ F.L.W. S___ (Fla. January 23, 1992)	DP	DP	Y	Y	Affirmed Death Penalty; CCP struck	Agg: prior violent felony; Committed during sexual battery, kidnap & burglary; HAC; CCP Mit: age; family history; educatl aid to other imates

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Hodges v. State __ F.L.W. S___ (Fla. January 23, 1992)	DP	DP	N	O	Affirmed Death Penalty Proportionate	Agg: hinder law enforcement; CCP Mit: none
Pettit v. State 17 F.L.W. S41 (Fla. January 9, 1992)	No Jury	DP	N	Y	Affirmed Death Penalty Harmless error on under sent. of imprisonment rather on probation; still appropriate	Agg: under sent. of imprisonment; prior violent felony; committed during felony Mit: none
Dougan v. State 17 F.L.W. S10 (Fla. January 2, 1992)	DP	DP	Y	O	Affirmed Death Penalty Proportionate	Agg: committed during kidnapping; HAC; CCP Mit: none
Watts v. State 17 F.L.W. S27 (Fla. January 2, 1992)	DP	DP	Y	Y	Affirmed Death Penalty HAC DIDN'T EFFECT WEIGHING PROCESS; proportionality discussed	Agg: previous violent felony; during sexual battery; financial gain; HAC Mit: low IQ - nonstatutory only; age;
Wickham v. State 16 F.L.W. S777 (Fla. December 20, 1991)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC	Six Agg., No Mit.
Gaskin v. State 16 F.L.W. S762 (Fla. December 5, 1991)	DP	DP	Y	O	Affirmed Death Penalty No penalty error; If HAC not found-harmless error	Agg: CCP; prev. capital felony; HAC (HAC found as to only one victim) committed during robbery/burglary; Mit: under influence of extreme emotion; deprived childhood

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Klokoc v. State 16 F.L.W. S756 (Fla. November 27, 1991)	Waived	Life	N	O	Resentenced; Reduced to life based on agg. does not outweigh mit.	1 Agg., 5 Mit.
Espinosa v. State 16 F.L.W. S753 (Fla. November 27, 1991)	DP	DP	Y	O	Affirmed Death Penalty	Agg: previous violent felony; prevent lawful arrest; during armed burglary; HAC (Co-defendant Death) Mit: no significant history; good man
Dailey v. State 16 F.L.W. S74 (Fla. November 14, 1991)	DP	DP	Y	N	Remanded for resentencing without jury; dropped committed to avoid arrest & CCP	Agg: prev. felony; avoid arrest; HAC CCP; comm. during sexual battery Mit: none
Cruse v. State 16 F.L.W. S701 (Fla. October 24, 1991) (5 victims)	DP	DP	N	O	Affirmed Death Penalty Proportionate	Agg: prior felony; great risk; CCP; prevent lawful arrest Mit: extreme emotional disturbance
Santos v. State 16 F.L.W. S633 (Fla. October 26, 1991)	DP	DP	Y	N	New Sentencing without jury trial court overlooked mitigation; STRUCK HAC	Agg: prev. conviction; HAC; CCP Mit: none
Sireci v. State 587 So.2d 450 (Fla.1991)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior felony; HAC; CCP; pecuniary gain; eliminate witness; comm/robbery Nonstatutory mitigation found

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Tillman v. State 16 F.L.W. S674 (Fla. October 17, 1991)	Pled	DP	Y	N	Vacated Death Penalty Life Imposed	Agg: HAC; on parole/murder Mit: presented — Court stated had to abide by agreement of plea for penalty
Ponticelli v. State 16 F.L.W. S669 (Fla. October 10, 1991)	DP	DP	Y	O	Affirmed Death Penalty	Agg: Comm. pecuniary gain; CCP: HAC (as to one victim) Mit: no significant history; age
Savage v. State 16 F.L.W. S647 (Fla. October 3, 1991)	Life	DP	N	O	Vacated Death Penalty Life Imposed	Jury recomendation followed based on numerous factors
Bowden v. State 16 F.L.W. S614 (Fla. September 12, 1991)	DP	DP	Y	Y	Affirmed Death Penalty struck prev. felony- harmless error	Agg: prev. felony; HAC Mit: horrible childhood (non-stat)
Maqueira v. State 16 F.L.W. S599 (Fla. August 29, 1991)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC Mit: none	Agg: prev. felony; HAC; avoid arrest; comm/ during burglary
Burns v. State 16 F.L.W. S389 (Fla. May 16, 1991)	DP	DP	Y	N	Remand new sentence with jury STRUCK HAC	Agg: avoid arrest; HAC Mit: no significant history; other nonstatutory mitigation
Davis v. State 586 So.2d 1038 (Fla.1991)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; CCP; prev. felony; sent. of imprisonment Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Henry v. State 586 So.2d 1033 (Fla.1991)	DP	DP	Y	O	Affirmed Death Penalty	Agg: Comm/robbery; avoid arrest; pecuniary gain; HAC; CCP Mit: none
Wright v. State 586 So.2d 1024 (Fla.1991)	Life	DP	O	O	New Trial; must give life Sentenced to life if convicted again	Trial errors-new trial
Craig v. State 585 So.2d 278 (Fla.1991)	Life	DP	O	O	Reversed Death Penalty Override Life Sentence Imposed	
Omelus v. State 584 So.2d 563 (Fla.1991)	DP	DP	Y	N	Remanded/New sentencing without jury; STRUCK HAC	
Beltran-Lopez v. State 583 So.2d 1030 (Fla.1991)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior felony; prevent arrest; comm/armed burglary; HAC Mit: no significant history; good son
Craig (Donnie) v. State 583 So.2d 1018 (Fla.1991)	X	X	X	O	New Trial Jury Selection Infirmed	
Capehart v. State 583 So.2d 1009 (Fla.1991)	DP	DP	Y	Y	Affirmed Death Penalty Struck CCP	Agg: CCP; HAC; prev. felony; comm/robbery Mit: nonstatutory

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Green v. State 583 So.2d 647 (Fla.1991)	DP	DP	Y	Y	Affirmed Death Penalty Avoid arrest not valid; improper doubling; CCP struck	Agg: prev. felony; comm/robbery; avoid arrest; pecunary gain; HAC; CCP Mit: none
Christopher v. State 583 So.2d 642 (Fla.1991)	DP	X	O	O	Ct. gives life due to no written order by the trial judge	
Taylor v. State 583 So.2d 323 (Fla.1991)	DP	DP	Y	N	Resentence without jury Improper prosecutor's argument	Agg: prev. felony; comm/sexual battery; HAC Mit: none
McCrae v. State 582 So.2d 613 (Fla.1991)	Life	DP	Y	N	Remand for life sentence Due to override improper	Agg: prev. felony; comm/sexual battery; HAC (override case)
Gilliam v. State 582 So.2d 610 (Fla.1991)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; prev. felony; comm/sex. battery; Mit: broken home; physical abuse; family wanted mercy (nonstatutory)
Scott v. State 581 So.2d 887 (Fla.1991)	DP	DP	Y	N	Released from prosecution based on delay in being brought to trial	Agg: HAC; comm/kidnapping; avoid arrest; CCP Mit: none
Cook v. State 581 So.2d 141 (Fla.1991)	DP	DP	N	Y	Affirmed Death Penalty Proportionate	Agg: prev. felony; comm/robbery; pecuniary gain Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Riechmann v. State 581 So.2d 133 (Fla.1991)	DP	DP	N	O	Affirmed Death Penalty	Agg: pecuniary gain; CCP Mit: good man
Hayes v. State 581 So.2d 121 (Fla.1991)	DP	DP	N	O	Affirmed Death Penalty Proportionate	Agg: CCP; robbery/pecuniary gain Mit: age
Cooper v. State 581 So.2d 49 (Fla.1991)	Life	DP	N	O	Reversed; Ct. imposed life sentence	Agg: sent/imprison; prev. felony; comm/robbery; avoid arrest Mit: family ties; alcohol abuse
Valle v. State 581 So.2d 40 (Fla.1991)	DP	DP	N	Y	Affirmed Death Penalty Harmless error-no remorse improper	Agg: prev. felony; CCP; (murder law law enforcement officer;preventing arrest;hinder law enforcement-merged); Mit: none
Derrick v. State 581 So.2d 31 (Fla.1991)	DP	DP	Y	O	Remand for new sentence with jury; improper consideration of no remorse	Agg: comm/robbery; avoid arrest; HAC; CCP Mit: age
Asay v. State 580 So.2d 610 (Fla.1991)	DP	DP	N	O	Affirmed Death Penalty Proportionate	Agg: under sent/imprisonment; prev. capital felony-2ND MURDER: CCP Mit: age
Jones v. State 580 So.2d 143 (Fla.1991)	DP	DP	N	Y	Affirmed Death Penalty Struck robbery factor Harmless	Agg: under sent/imprisonment; prior violent felony; comm/robbery (avoid arrest;detention law enforcement officer-merged) Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Walls v. State 580 So.2d 131 (Fla.1991)	DP	DP	O	O	Reversed for new trial; Due process issue-Miranda	
Zeigler v. State 580 So.2d 127 (Fla.1991) (Resentencing)	Life	DP	Y	O	Affirmed Death Penalty	Agg: HAC; pecuniary gain; avoid arrest; prev. capital felony Mit: no significant history
Young v. State 579 So.2d 721 (Fla.1991)	DP	DP	N	Y	Affirmed Death Penalty Struck CCP harmless error Proportionate	Agg: comm/burgiary; pecuniary gain; avoid arrest; CCP Mit: church activities;conform to rules in prison
Shere v. State 579 So.2d 86 (Fla.1991)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC-Harmless	Agg: disrupt law enforcement; HAC; CCP Mit: mitigation did not outweigh aggravation.
McKinney v. State 579 So.2d 80 (Fla.1991)	DP	DP	Y	N	Vacated DP/Remand for Life STRUCK HAC; CCP	Agg: HAC; CCP; comm/robbery Mit: no significant history other nonstatutory mitigation
Hitchcock v. State 578 So.2d 685 (Fla.1990) (Resentencing)	DP	DP	Y	O	Affirmed Death Penalty Proportionality	Agg: sent/imprisonment; comm/ sexual battery; avoid arrest; HAC Mit: Age, deprivation, character traits; drug use; alcohol
Carter v. State 576 So.2d 1291 (Fla.1990)	DP Life	DP Life	N	O	Affirmed Death Penalty Proportionate	Agg: sent/imprisonment; prev. felony; comm/robbery Mit: deprived childhood

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Trotter v. State 576 So.2d 691 (Fla.1990)	DP	DP	Y	N	Remand for Sentencing without jury Struck comm/under sentence	Agg: comm/under sent; prev. felony; comm/robbery; HAC Mit: extreme mental capacity impaired; low IQ; family problems; remorse
Dolinsky v. State 576 So.2d 271 (Fla.1991)	Life	DP	N	N	Death Penalty Vacated Sentenced to Life Struck CCP	Agg: prev. violent conviction; CCP; comm/robbery Mit: none
(Clinton) Jackson v. State 575 So.2d 181 (Fla.1991)	DP	DP	N	O	Death Penalty Vacated based on Enmund/Tison	Agg: comm/robbery; avoid arrest Mit: none
Hegwood v. State 575 So.2d 170 (Fla.1991)	Life	DP	Y	O	Vacated Override; imposed Life	Agg: prev. violent crime; comm/ robbery; avoid arrest; pecuniary gain (merged w/robbery); HAC; CCP Mit: age (17 yrs.)
Douglas v. State 575 So.2d 165 (Fla.1991)	Life	DP	Y	N	Vacated Override; Life sentence imposed; struck CCP	Agg: HAC; CCP Mit: non-violent person; good institutional record
Downs v. State 574 So.2d 1095 (Fla.1991)	Life	DP	Y	N	Vacated Override; Life Sentence imposed	Agg: HAC; CCP; comm/robbery; prior felony Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Gunsby v. State 574 So.2d 1085 (Fla.1991)	DP	DP	N	O	Affirmed Death Penalty Proportionality	Agg: CCP; prior felony; comm/under sentence of imprisonment Mit: mildly retarded
Penn v. State 574 So.2d 1079 (Fla.1991)	DP	DP	Y	N	Remand Sentence to Life Struck CCP	Agg: HAC; CCP Mit: no sign. history; under extreme influence
Nibert v. State 574 So.2d 1059 (Fla.1990) (RESENTENCE)	DP	DP	Y	N	Vacated Death Penalty Sentenced to Life; found other mitigation	Agg: HAC Mit: possible childhood abuse
Williams v. State 574 So.2d 136 (Fla.1991)	DP	DP	X	X	New Trial Slappy/Neil/Batson trial issue	
Reaves v. State 574 So.2d 105 (Fla.1991)	DP	DP	X	X	New Trial	
Anderson v. State 574 So.2d 87 (Fla.1991)	DP	DP	N	O	Affirmed Death Penalty	Agg: pecuniary gain; CCP Mit: codefendant pled-recv'd lesser sentence
Bruno v. State 574 So.2d 76 (Fla.1991)	DP	DP	Y	Y	Affirmed Death Penalty Proportionate; struck prior felony	Agg: prior felony; pecuniary gain; HAC; CCP Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Henry v. State 574 So.2d 73 (Fla.1991)	DP	DP	X	X	New Trial-Court observed CCP not sustainable	
Henry v. State 574 So.2d 66 (Fla.1990)	DP	DP	X	X	New Trial	
Holton v. State 573 So.2d 284 (Fla.1990)	DP	DP	Y	Y	Affirmed Death Penalty Struck prior conviction and CCP	Agg: prior convict; comm/sexual sexual battery; HAC; CCP Mit: drug addiction; had children
Nowitzke v. State 572 So.2d 1346 (Fla.1990)	DP	DP	X	X	New Trial-Improper prosecutorial conduct, et al.	
Nixon v. State 572 So.2d 1336 (Fla.1990)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior violent felony; comm/kidnap; pecuniary gain; HAC; CCP Mit: none
Lewis v. State 572 So.2d 908 (Fla.1990)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior violent felony; comm/kidnap; HAC Mit: none
Downs v. State 572 So.2d 895 (Fla.1990)	DP	DP	N	O	Affirmed Death Penalty Proportionate	Agg: prior convict; pecuniary gain; CCP Mit: nothing to override aggravation
Campbell v. State 571 So.2d 415 (Fla.1990)	DP	DP	Y	N	Remand for Resentencing without jury; struck CCP	Agg: prior convict; comm/burglary; HAC; pecuniary gain; CCP Mit: nonstatutory

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Colina v. State 570 So.2d 929 (Fla.1991)	DP	DP	Y	N	New Sentence with jury Improper admissions at penalty phase	Agg: comm/robbery; avoid arrest; HAC; CCP Mit: none
Czubak v. State 570 So.2d 925 (Fla.1990)	DP	DP	X	X	New Trial	
Buford v. State 570 So.2d 923 (Fla.1990) (Resentence)	Life	DP	Y	O	Override Vacated Reduced to Life Sentence	Agg: comm/sexual battery; HAC Mit: no sign. history; age
Sanchez-Velasco v. State 570 So.2d 908 (Fla.1990)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; comm/sexual battery Mit: none
Occhicone v. State 570 So.2d 902 (Fla.1990)	DP	DP	N	O	Affirmed Death Penalty	Agg: prior felony; comm/burglary; CCP Mit: none
Scull v. State 569 So.2d 1251 (Fla.1990) (Resentence)	DP	DP	X	X	New Sentencing without jury	
Jones v. State 569 So.2d 1234 (Fla.1990)	DP	DP	N	N	New Sentencing without jury rejects trial court's instruction on HAC; no factual support whether sexual battery on corpse	Agg: pecuniary gain; CCP Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Floyd v. State 569 So.2d 1225 (Fla.1990) (Resentence)	DP	DP	Y	O	Affirmed Death Penalty	Agg: pecuniary gain; HAC Mit: none
Farinas v. State 569 So.2d 425 (Fla.1990)	DP	DP	Y	N	Vacated Death Penalty Imposed Life Sentence Struck CCP	Agg: comm/kidnap; HAC; CCP Mit: under emotional disturbance; impaired capacity
Cheshire v. State 568 So.2d 908 (Fla.1990)	Life	DP	Y	N	Vacated Override Life Sentence HAC IMPROPERLY FOUND	Agg: prior convict; comm/burglary; HAC Mit: none
Garcia v. State 568 So.2d 896 (Fla.1990)	DP	DP	X	X	New Trial; severance of charges issue	
Duckett v. State 568 So.2d 891 (Fla.1990)	DP	DP	Y	O	Affirmed Death Penalty	Agg: comm/sexual battery; HAC Mit: no sign. history; (family background; education-nonstatutory)
Hall v. State 568 So.2d 882 (Fla.1990)	DP	DP	X	X	New Trial testimony of expert re: sanity defense improperly excluded	

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Lucas v. State 568 So.2d 18 (Fla.1990) (Resentence)	DP	DP	X	X	Vacated Death Penalty Resentence again without jury	
Thompson v. State 565 So.2d 1311 (Fla.1990)	DP	DP	N	N	Vacated Death Penalty Life Sentence Imposed Struck CCP; only aggravation found	Agg: CCP Mit: no sign. history (emotional stress; maintained employmt; considerate son; good inmate-nonstatutory)
Bryant v. State 565 So.2d 1298 (Fla.1990)	DP	DP	X	X	New Trial Slappy/Neil/Batson issue	
Livingston v. State 565 So.2d 1288 (Fla.1990)	DP	DP	N	N	Vacated Death Penalty Reduced to Life Struck avoid arrest	Agg: prior convict;comm/robbery; avoid arrest Mit: age (juvenile-17 yrs); unfortunate homelife
Brown v. State 565 So.2d 304 (Fla.1990)	DP	DP	N	O	Affirmed Death Penalty Proportionate	Agg: prior convict;comm/felony; CCP; Mit: mental capacity; emotional stress; economic deprivation; non-violent past
Van Poyck v. State 564 So.2d 1066 (Fla.1990)	DP	DP	N	O	Affirmed Death Penalty	Agg: under sent/imprison;effect escape; created great risk: prior conviction Mit: rejected mit. re: poor childhood

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Porter v. State 564 So.2d 1060 (Fla.1990)	DP	DP	Y	O	Affirmed Death Penalty Proportionate	Agg: prior felony convict; comm/burglary HAC; CCP Mit: none
Garcia v. State 564 So.2d 124 (Fla.1990)	DP	DP	X	X	New Trial based on evidence not provided	
Pardo v. State 563 So.2d 77 (Fla.1990)	DP	DP	N	O	Affirmed Death Penalty Proportionate; Ct. found mitigation no significant history improperly found by trial court	Agg: each CCP; death of drug informant; hinder law enforcement; pecuniary gain Mit: trial court found no sign. mitigation
Freeman v. State 563 So.2d 73 (Fla.1990)	DP	DP	N	O	Affirmed Death Penalty Proportionate	Agg: prior felony; comm/burglary; pecuniary gain Mit: nonstatutory-low IQ; abused by stepfather; artistic ability; enjoyed playing w/kids
Randolph v. State 62 So.2d 331 (Fla.1990)	DP	DP	Y	O	Affirmed Death Penalty	Agg: flight after sexual battery; avoid detection; pecuniary gain; HAC Mit: atypical personality disorder; expressed shame and remorse
Blakely v. State 561 So.2d 560 (Fla.1990)	DP	DP	Y	O	Remand for Life Sentence Disproportionate-Wife Killed	Agg: HAC; CCP Mit: no significant history

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Rivera v. State 561 So.2d 536 (Fla.1990)	DP	DP	Y	Y	Affirmed Death Penalty Struck CCP	Agg: prior conv; comm/felony; HAC; CCP Mit: extreme emotional stress
Haliburton v. State 561 So.2d 248 (Fla.1990)	DP	DP	N	O	Affirmed Death Penalty	Agg: under sent/imprison;prior felony; engaged in burglary; CCP Mit: insufficient to outweigh aggravation
Carter v. State 560 So.2d 1166 (Fla.1990)	Life	DP	X	X	Vacated Override Reduced to Life	
Hallman v. State 560 So.2d 223 (Fla.1990)	Life	DP	Y	O	Vacated Override Reduced to Life STRUCK HAC; great risk	Agg: under sent/imprison; avoid detect; flight from armed robbery; HAC; great risk Mit: family; abusive childhood; good person (above argued-court found none
Ventura v. State 560 So.2d 217 (Fla.1990)	DP	DP	N	O	Affirmed Death Penalty	Agg: pecuniary gain; CCP Mit: none
Owen v. State 560 So.2d 207 (Fla.1990)	DP	DP	X	X	New Trial based on Fifth Amendment confession issue	

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Reed v. State 560 So.2d 203 (Fla.1990)	DP	DP	Y	Y	Affirmed Death Penalty Struck prior felony; CCP	Agg: prior felony; comm/sexual battery; avoid detection; pecuniary gain; CCP; HAC Mit: none
Bouie v. State 559 So.2d 1133 (Fla.1990)	DP	DP	X	X	Death Penalty Vacated-No specific written findings by trial court; sentenced to life	
Reilly v. State 557 So.2d 1365 (Fla.1990)	DP	DP	X	X	New trial due to failure to excuse for cause prospective jurors	
Morris v. State 557 So.2d 27 (Fla.1990)	Life	DP	Y	O	Vacated Override Life Sentence Imposed	Agg: HAC Mit: borderline IQ; grief for murder
Thompson v. State 553 So.2d 153 (Fla.1989)	Life	DP	Y	O	Affirmed Death Penalty contract killing	Agg: prior violent felony; comm/ kidnap; pecuniary gain; CCP; HAC Mit: none
Christian v. State 550 So.2d 450 (Fla.1989)	Life	DP	Y	N	Override Vacated Life Sentence Imposed Struck CCP	Agg: under sent/imprison; prior felony; HAC; CCP Mit: none
Fuente v. State 549 So.2d 652 (Fla.1989)	Life	DP	N	O	Override Vacated Life Sentence Imposed disparate treatment	Agg: prior convict; avoid arrest; CCP Mit: 6 mos. after murder, saved life

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Zerquera v. State 549 So.2d 189 (Fla.1989)	DP	DP	X	X	New Trial due to confession issue	
Hill v. State 549 So.2d 179 (Fla.1989)	DP	DP	Y	N	Remanded for resentencing with jury-struck pecuniary gain	Agg: HAC; comm/sex. battery pecuniary gain Mit: no significant history
Stewart v. State 549 So.2d 171 (Fla.1989)	DP	DP	X	X	Remanded for written findings by trial court	
Alvin v. State 548 So.2d 1112 (Fla.1989)	DP	DP	N	N	Remanded for Resentencing without jury; Struck great risk	Agg: great risk; comm/robbery Mit: none
Thompson v. State 548 So.2d 198 (Fla.1989)	X	DP	X	X	New Trial re: Slappy/ Batson issue	
Stokes v. State 548 So.2d 188 (Fla.1989)	DP	DP	N	N	New Trial-Neil/Slappy/ Batson Struck CCP	Agg: comm/robbery; CCP Mit: none
Rhodes v. State 547 So.2d 1201 (Fla.1989)	DP	DP	Y	N	New Sentencing with jury STRUCK HAC; prior conviction; CCP	Agg: prior felony convict; comm/ sexual battery; HAC; CCP Mit: personality disorder

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Cochran v. State 547 So.2d 928 (Fla.1989)	Life	DP	Y	N	Vacated Override Life Sentence Imposed STRUCK HAC low IQ; emotionally disturbed; reading handicapped	Agg: prior capital felony; HAC; pecuniary gain; comm/kidnap Mit: none
Bello v. State 547 So.2d 914 (Fla.1989)	DP	DP	N	O	Vacated Death Sentence New Sentencing without jury Struck great risk; improper doubling	Agg: prior convict; great risk; (avoid arrest; hinder law enforce- merged) Mit: no significant history
Walton v. State 547 So.2d 622 (Fla.1989) (Resentence)	DP	DP	Y	Y	Affirmed Death Penalty Harmless error as to penalty admission	Agg: comm/robbery/burglary; pecuniary gain; HAC; CCP Mit: none
Hamilton v. State 547 So.2d 630 (Fla.1989)	DP	DP	Y	N	New Trial due to juror who was not impartial STRUCK HAC; CCP	Agg: HAC; CCP; prior convict Mit: no sign. history;nonviolent person; served honorably armed forces; didn't drink to excess
Barwick v. State 547 So.2d 612 (Fla.1989)	X	DP	X	X	New trial due to exclusion of black jurors	
Freeman v. State 547 So.2d 125 (Fla.1989)	Life	DP	Y	O	Vacated Override Life Sentence imposed; Ct. found mitigation of age	Agg: HAC; comm/burglary;prior convict. Mit:abuse;psychological problems

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Castro v. State 547 So.2d 111 (Fla.1989)	DP	DP	Y	N	New Sentencing with jury due to Williams Rule evid. presented at guilt that impacted on penalty phase	Agg: CCP; HAC; comm/robbery Mit: none
Roundtree v. State 546 So.2d 1042 (Fla.1989)	X	DP	X	X	New Trial re: Slappy/ Batson	
Smalley v. State 546 So.2d 720 (Fla.1989)	DP	DP	Y	O	Vacated Death Penalty Sentenced to Life Proportionate	Agg: HAC Mit: lack of criminal history; extreme emotional disturbance; impaired capacity; extreme duress (nonstatutory: abusedchildhood; work record; remorse)
Spencer v. State 545 So.2d 1352 (Fla.1989)	X	DP	X	X	New trial-racial composition of jury pool	
Rivera v. State 545 So.2d 864 (Fla.1989)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC; CCP	Agg: prior convict; great risk; comm/flight/robbery; avoid arrest; HAC; CCP Mit: none
Pentecost v. State 545 So.2d 861 (Fla.1989)	Life	DP	Y	O	Vacated Override Sentenced to Life	Agg: comm/burglary; HAC; CCP Mit: no significant history

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Dudley v. State 545 So.2d 857 (Fla.1989)	DP	DP	Y	N	Death Penalty Vacated Resentencing with jury Struck CCP	Agg: HAC; CCP; comm/robbery; financial gain Mit: medical and psychological problems
Rutherford v. State 545 So.2d 853 (Fla.1989)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; CCP (comm/robbery; pecuniary gain-merged) Mit: no significant history
Mendyk v. State 545 So.2d 846 (Fla.1989)	DP	DP	Y	O	Affirmed Death Penalty	Agg: comm/kidnap/sexual battery; HAC; CCP Mit: age (21 yrs.)
Jackson v. State 545 So.2d 260 (Fla.1989)	DP	DP	X	X	New trial due to improper comments	
Songer v. State 544 So.2d 1010 (Fla.1989) (Resentence)	DP	DP	N	O	Death Penalty not appropriate life sentence	Agg: under sent/imprison Mit: numersus mitigation
Cherry v. State 544 So.2d 184 (Fla.1989)	DP	DP	Y	Y	Affirmed Death Penalty as to Mrs. Wayne; life for husband; improper doubling	Agg: prior felony; (comm/burglary; pecuniary gain-merged); HAC Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Cook v. State 542 So.2d 964 (Fla.1989)	DP	DP	Y	N	Vacated Death Sentence; Remand as to Mrs. Beaucourt murder; resentence without jury STRUCK HAC; avoid arrest	Agg: HAC; avoid arrest; (comm/ robbery; pecuniary gain-merged); prior convict.
Ramirez v. State 542 So.2d 352 (Fla.1989)	DP	DP	X	X	New Trial-improper admission of evidence	
Brown v. State 538 So.2d 833 (Fla.1989)	X	DP	X	X	New trial re: ex parte communications.	
Hudson v. State 538 So.2d 829 (Fla.1989)	DP	DP	N	O	Affirmed Death Penalty Proportionate	Agg: prior convict; comm/robbery Mit: letter weight to extreme emotion impaired capacity; age (22 yrs)
Edwards v. State 538 So.2d 440 (Fla.1989)	X	DP	X	X	New trial due to admiss. in-court ID without counsel	
Schafer v. State 537 So.2d 988 (Fla.1989)	DP	DP	Y	N	Vacated Death Penalty-New Sentencing without jury; Struck CCP; prior felony; avoid arrest	Agg: prior felony;comm/robbery; avoid arrest; HAC; CCP Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Mack v. State 537 So.2d 109 (Fla.1989)	X	DP	X	X	New trial-failure to obtain waiver from defendant on instruction	
Lopez v. State 536 So.2d 226 (Fla.1988)	DP	DP	N	O	Affirmed Death Penalty	Agg: prior convict; avoid arrest; comm/burglary Mit: none
Banda v. State 536 So.2d 221 (Fla.1988)	DP	DP	N	N	Vacated Death Penalty Remand sentence to life; no agg's; Struck CCP	Agg: CCP
Scull v. State 533 So.2d 1137 (Fla.1988)	DP	DP	Y	N	Vacated Death Penalty; Resentencing without jury; Struck great risk; avoid arrest; pecuniary gain; CCP	Agg: great risk;comm/burglary; avoid arrest pecuniary gain; HAC; CCP Mit: no significant history; age (24 yrs)
LeCroy v. State 533 So.2d 750 (Fla.1988)	DP	DP	N	O	Affirmed Death Penalty	Agg: prior convict; comm/robbery; avoid arrest Mit: no sign. history; age (17 yrs)
Bryan v. State 533 So.2d 744 (Fla.1988)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior convict; comm/kidnap/ robbery; avoid arrest; pecuniary gain; CCP; HAC Mit: good work record; gainfully employed

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Kyser v. State 533 So.2d 285 (Fla.1988)	X	DP	X	X	New trial-inadmissibility of statement	
Swafford v. State 533 So.2d 270 (Fla.1988)	DP	DP	Y	O	Affirmed Death Penalty	Agg: avoid arrest; HAC; CCP; comm/flight/sexual battery Mit: good eagle scout
Lamb v. State 532 So.2d 1051 (Fla.1988)	DP	DP	Y	N	Vacated Death Penalty New Sentencing without jury Struck prior conviction	Agg: prior convict; HAC; CCP; comm/burglary Mit: codefendant sent. mitigation
Amores v. State 531 So.2d 1256 (Fla.1988)	DP	DP	Y	N	Life Sentence Appropriate STRUCK HAC; CCP; therefore, no aggravating circumstances	Agg: HAC; CCP Mit: nonstatutory
Pridgen v. State 531 So.2d 951 (Fla.1988)	DP	DP	Y	O	New sentencing with jury Struck penalty due to trial courts failure to do competency hearing prior to sentence	Agg: under sent/imprison; prior felony; comm/robbery;avoid arrest; pecuniary gain; HAC; CCP Mit: none
Hildwin v. State 531 So.2d 124 (Fla.1988)	DP	DP	Y	Y	Affirmed Death Penalty Struck prior felony	Agg: prior felony; under sent/ imprison; pecuniary gain; HAC Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Jackson v. State 530 So.2d 269 (Fla.1988)	DP	DP	Y	Y	Affirmed Death Penalty Struck CCP-Harmless error	Agg: under sent/imprison; prior felony; financial gain; CCP; HAC Mit: none to outweigh
Turner v. State 530 So.2d 45 (Fla.1988)	Life DP	DP	Y	O	Affirmed Death Penalty	Agg: prev. felony; comm/burglary; HAC; CCP Mit: outweighed by aggravation
Spivey v. State 529 So.2d 1088 (Fla.1988)	Life	DP	N	O	Vacated Override Life Sentence imposed Struck prior conviction	Agg: prior felony; pecuniary gain Mit: impoverished childhood; cohorts plea bargained for life
Harvey v. State 529 So.2d 1083 (Fla.1988)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; avoid arrest; CCP; comm/ robbery Mit: none
Long v. State 529 So.2d 286 (Fla.1988)	DP	DP	Y	N	New sentencing with jury Struck prior conviction	Agg: comm/kidnap; prior conviet; HAC; CCP Mit: under influence extreme emotional capacity to appreciate impaired
Garron v. State 528 So.2d 353 (Fla.1988)	DP	DP	X	X	New trial based on trial errors	

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Fitzpatrick v. State 527 So.2d 809 (Fla.1988)	DP	DP	N	O	Vacated Death Penalty Reduced Sentence to Life Death not appropriate due to proportionality	Agg: prior convict.; great risk; comm/kidnap; avoid arrest; pecuniary gain Mit: extreme emotional stress; (great deal of mitigation)
Hamblen v. State 527 So.2d 800 (Fla.1988)	DP	DP	N	Y	Affirmed Death Penalty Struck CCP	Agg: CCP; prior convict: comm/robbery Mit: none
Buenoano v.State 527 So.2d 194 (Fla.1988)	DP	DP	Y	O	Affirmed Death Penalty	Agg: pecuniary gain; HAC; CCP; prior convict Mit: none
Harmon v. State 527 So.2d 182 (Fla.1988)	Life	DP	N	O	Override reversal-Life imposed;struck CCP	Agg: prior felony; pecuniary gain; CCP; avoid detection Mit: none
Mitchell v. State 527 So.2d 179 (Fla.1988)	DP	DP	Y	Y	Affirmed Death Penalty Struck CCP-Harmless Error	Agg: prior convict; comm/robbery; HAC; CCP Mit: none
Brown v. State 526 So.2d 903 (Fla.1988)	Life	DP	Y	N	Vacated Override Life Sentence imposed STRUCK HAC	Agg: prior felony; comm/robbery; HAC Mit: age
Moore v. State 525 So.2d 870 (Fla.1988)	DP	DP	X	X	New trial-trial errors	

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Grossman v. State 525 So.2d 833 (Fla.1988)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; avoid detection/hinder law enforcement; avoid arrest; comm/robbery Mit: not outweigh agg.
Torres-Arboledo v. State 524 So.2d 403 (Fla.1988)	Life	DP	N	O	Affirmed Death Penalty override sustained	Agg: comm/robbery; prior felony convict. Mit: harmless if any/mit. not considered
Lloyd v. State 524 So.2d 396 (Fla.1988)	DP	DP	Y	N	Vacated Override; Life Sentence; STRUCK HAC; CCP Not Proportionate	Agg: comm/rape/robbery; CCP; HAC Mit: good husband;dependable worker
Merritt v. State 523 So.2d 573 (Fla.1988)	X	DP	X	X	New trial-trial errors	
Correll v. State 523 So.2d 562 (Fla.1988)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior felony; HAC; comm/robbery; avoid arrest; HAC; CCP Mit: none
Caillier v. State 523 So.2d 158 (Fla.1988)	Life	DP	N	O	Vacated Override Life Sentence Imposed (codefendant received life)	Agg: financial gain; CCP Mit: no significant history

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Remeta v. State 522 So.2d 825 (Fla.1988)	DP	DP	N	O	Affirmed Death Penalty	Agg: prior convict; comm/robbery; avoid detection; CCP Mit: mental age (13) deprived childhood; Low IQ; speech problem; substance abuse
Perry v. State 522 So.2d 817 (Fla.1988)	Life	Life	Y	O	Vacated Override Life Sentence Imposed Struck prior conviction; no sign. history	Agg: prior convict; eliminate witness; CCP; comm/robbery; HAC Mit: none
Jackson v. State 522 So.2d 802 (Fla.1988) (2 victims)	DP Life	DP	Y	O	Affirmed Death Penalty Proportionate	Agg: prior convict; HAC; CCP Mit: model prisoner; could adjust to prison life, not a behavior problem
Holsworth v. State 522 So.2d 348 (Fla.1988)	Life	DP	Y	O	Override Vacated Life Sentence Imposed	Agg: prev. felony; comm/robbery; HAC Mit: expressly rejected mit. tendered
Tillman v. State 522 So.2d 14 (Fla.1988)	DP	DP	X	X	New Sentence with jury due to selection of penalty jury Neil/Slappy/Batson	
Hardwick v. State 521 So.2d 1071 (Fla.1988)	DP	DP	Y	Y	Affirmed Death Penalty Struck comm/kidnap; pecuniary	Agg: prior felony; comm/kidnap; HAC; pecuniary gain; CCP Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Kritzman v. State 520 So.2d 568 (Fla.1988)	X	DP	X	X	New trial-trial errors	
Duboise v. State 520 So.2d 260 (Fla.1988)	Life	DP	Y	N	Vacated Override-Life Sentence Imposed;Ct. found possible mitigation: age (18); domination; deprived family life; IQ 79	Agg: comm/felony; avoid arrest; HAC Mit: none
Robinson v. State 520 So.2d 1 (Fla.1988)	DP	DP	X	X	Vacated Death Penalty New Sentence with jury State impermissibly argued evidence	
Long v. State 517 So.2d 664 (Fla.1987)	DP	DP	X	X	Nonstatutory agg.; no remorse New trial-defendant's statement improperly used	
Masterson v. State 516 So.2d 256 (Fla.1987)	Life	DP	N	O	Vacated Override; Life Sentence Imposed; Ct. found mitigation: Viet Nam vet; wounded, drug use	Agg: CCP; comm/robbery; avoid arrest prior felony Mit: none
Brown v. State 515 So.2d 211 (Fla.1987)	X	DP	X	X	New trial-failure re: Richardson hearing	

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Smith v. State 515 So.2d 182 (Fla.1987)	DP	DP	Y	Y	Affirmed Death Penalty Struck CCP	Agg: under sent/imprison; prior felony; comm/sexual battery/ burglary; HAC; CCP Mit: gave little weight
Gilliam v. State 514 So.2d 1098 (Fla.1987)	X	DP	X	X	New trial-trial errors	
King v. State 514 So.2d 354 (Fla.1987)	DP	DP	Y	N	Affirmed Death Penalty Struck arson/great risk	Agg: prior felony; sent/imprison; HAC; arson/great risk; burglary/ sexual battery Mit: none
Patterson v. State 513 So.2d 1257 (Fla.1987)	DP	DP	Y	O	Remand without jury No written order by trial judge	Agg: prev. convict; comm/burglary; HAC Mit: no significant history
Koon v. State 513 So.2d 1253 (Fla.1987)	X	DP	X	X	New Trial-reversible error	
Diaz v. State 513 So.2d 1045 (Fla.1987)	DP	DP	N	O	Affirmed Death Penalty Struck great risk Proportionate	Agg: great risk; under sent/ imprison; prev. convict; comm/ kidnap; pecuniary gain Mit: none
Kight v. State 512 So.2d 922 (Fla.1987)	DP	DP	Y	O	Affirmed Death Penalty	Agg: comm/robbery; HAC Mit: nonstatutory

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Fead v. State 512 So.2d 176 (Fla.1987)	Life	DP	N	O	Vacated Override Life Sentence Imposed numerous mitigation	Agg: under sent/imprison; prior felony Mit: hardworker; good employee
Jennings v. State 512 So.2d 169 (Fla.1987)		DP	Y	Y	Affirmed Death Penalty	Agg: flight/burglary; HAC Mit: none
Rogers v. State 511 So.2d 526 (Fla.1987)	DP	DP	N	Y	Affirmed Death Penalty Struck pecuniary gain; avoid detection; CCP	Agg: pecuniary gain; avoid detection; CCP; comm/flight/robbery; prev. felony Mit: none
Williamson v. State 511 So.2d 289 (Fla.1987)	DP	DP	N	O	Affirmed Death Penalty	Agg: under sent/imprison; prev. convict; CCP Mit: none
Roberts v. State 510 So.2d 885 (Fla.1987)	DP	DP	Y	O	Affirmed Death Penalty Proportionate	Agg: prior convict; under sent/ imprison; comm/sexual battery; HAC Mit: none
Engle v. State 510 So.2d 881 (Fla.1987)		DP	Y	N	Affirmed Death Penalty	Agg: robbery/kidnap; avoid arrest; HAC; pecuniary gain Mit: none
Craig v. State 510 So.2d 857 (Fla.1987)	DP Life	DP	Y	N	Vacated Death Penalty New Sentencing without jury to consider Skipper evidence STRUCK HAC	Agg: financial gain; HAC; CCP Mit: no significant history Agg: (other murder) pecuniary gain; prior convict; HAC; CCP

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Hansbrough v. State 509 So.2d 1081 (Fla.1987)	Life	DP	Y	N	Override Vacated Life Sentence Imposed Struck avoid arrest; CCP	Agg: comm/robbery; avoid detection; HAC; CCP Mit: none
Nibert v. State 508 So.2d 1 (Fla.1987)	DP	DP	Y	N	Vacated Death Sentence Resentencing without jury Struck CCP; comm/robbery	Agg: HAC; CCP; comm/robbery Mit: none
Ferry v. State 507 So.2d 1373 (Fla.1987)	Life	DP	X	X	Override Vacated Life recommendation mental mitigation	Agg: (unknown) Mit: not significant
Bates v. State 506 So.2d 1033 (Fla.1987)	DP	DP	Y	O	Affirmed Death Penalty Struck burglary/robbery	Agg: burglary; robbery; HAC Mit: none
Wasko v. State 505 So.2d 1314 (Fla.1987)	Life	D	Y	O	Override Vacated Life Sentence Ir.:posed Struck prior conviction; other mitigation	Agg: prior convict; comm/felony; avoid detection; HAC Mit: no significant history
Keen v. State 504 So.2d 396 (Fla.1987)	DP	DP	X	X	New trial-Williams Rule Evid.	
Muehleman v. State 503 So.2d 310 (Fla.1987)	DP	DP	Y	N	Affirmed Death Penalty HAC; CCP	Agg: comm/robbery; avoid arrest; Mit: nonstatutory

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Tompkins v. State 502 So.2d 415 (Fla.1986)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior convict; comm/sexual battery; HAC Mit: age
Jackson v. State 502 So.2d 409 (Fla.1986)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC; comm/robbery; Proportionate	Agg: prior convict; comm/robbery; Mit: none
Melendez v. State 498 So.2d 1258 (Fla.1986)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior convict; comm/robbery HAC; CCP Mit: none
Jackson v. State 498 So.2d 906 (Fla.1986)	DP	DP	Y	N	Vacated Death Penalty New trial-trial error STRUCK HAC; CCP	Agg: HAC; CCP
Jackson v. State 498 So.2d 406 (Fla.1986)	DP	DP	N	Y	Affirmed Death Penalty; Improper doubling-harmless error	Agg: avoid arrest; hinder law enforce; CCP Mit: none
Floyd v. State 497 So.2d 1211 (Fla.1986)	DP	DP	Y	O	Vacated Death Penalty Resentencing with jury; Struck CCP; improper instruction re: mitigation	Agg: comm/burglary; avoid detection; HAC; CCP
Atkins v. State 497 So.2d 1200 (Fla.1986)	DP	DP	Y	N	Affirmed Death Penalty	Agg: comm/kidnap; avoid arrest; HAC Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Provenzano v. State 497 So.2d 1177 (Fla.1986)	DP	DP	N	O	Affirmed Death Penalty	Agg: prior convict; great risk; avoid arrest; hinder law enforcement; CCP Mit: no significant history
Arango v. State 497 S/2d 1161 (Fla.1986)	X	DP	X	X	New Trial	
Johnston v. State 497 So.2d 863 (Fla.1986)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior convict; comm/burglary; HAC Mit: none
Van Poyck v. State 497 So.2d 625 (Fla.1986)	Life	DP	X	X	Vacated Death Penalty Life sentence-no written order	
Irizarry v. State 496 So.2d 822 (Fla.1986)	Life	DP	Y	O	Vacated Override Reduced to Life Sentence (domestic setting)	Agg: prior convict; comm/burglary; CCP; HAC Mit: no sign. history; lived 40 yrs. w/crime
Way v. State 496 So.2d 126 (Fla.1986)	DP	DP	Y	O	Affirmed Death Penalty	Agg: great risk; comm/arson; HAC; CCP Mit: none
Ramos v. State 496 So.2d 121 (Fla.1986)	Life	DP	X	X	New trial-trial errors	

NAME	JURY-R?COM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Tefteteller v. State 495 So.2d 744 (Fla.1986)	DP	DP	Y	N	Affirmed Death Penalty	Agg: sent/imprison; prior felony; robbery Mit: none
Dufour v. State 495 So.2d 154 (Fla.1986)	DP	DP	N	Y	Affirmed Death Penalty Struck avoid arrest	Agg: avoid arrest; CCP Mit: 1
Huff v. State 495 So.2d 145 (Fla.1986)	DP	DP	Y	N	Affirmed Death Penalty Struck pecuniary gain	Agg: HAC; CCP; pecuniary gain Mit: no significant history
Brookings v. State 495 So.2d 135 (Fla.1986)	Life	DP	N	O	Vacated Override Life Sentence Imposed Disparate treatment of codefendant	Agg: under sent/imprison; prior convict's; pecuniary gain; hinder law enforcement; CCP Mit: saw father's suicide; disparate sentence of codef.; another received immunity
Puiatti v. State 495 So.2d 128 (Fla.1986)	DP	DP	N	O	Affirmed Death Penalty	Agg: avoid arrest; pecuniary gain; CCP Mit: none
Glock v. State 495 So.2d 128 (Fla.1986)	DP	DP	N	O	Affirmed Death Penalty	Agg: avoid arrest; pecuniary gain; CCP Mit: none
Lambrix v. State 494 So.2d 1143 (Fla.1986)	DP	DP	Y	O	Affirmed Death Penalty	Agg: under sent/imprison; prior convict; pecuniary gain; HAC; CCP Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Scott v. State 494 So.2d 1134 (Fla.1986)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior convict; comm/kidnap; HAC; financial gain; CCP Mit: age; impaired ability appreciate conduct
Muhammad v. State 494 So.2d 969 (Fla.1986)	Waived (jury)	DP	Y	O	Affirmed Death Penalty	Agg: under sent/imprison; prior felony; HAC Mit: none
Thompson v. State 494 So.2d 203 (Fla.1986)	X	DP	X	X	New Trial-Williams Rule Evid.	
Wilson v. State 493 So.2d 1019 (Fla.1986)	DP	DP	Y	N	Vacate/Resentencing	Agg: HAC; prior felony Mit: none
Kokal v. State 492 So.2d 1317 (Fla.1986)	DP	DP	Y	O	Affirmed Death Penalty	Agg: comm/robbery; avoid arrest; CCP; HAC Mit: none
Smith v. State 492 So.2d 1063 (Fla.1986)	DP	DP	X	X	New trial-trial errors	Agg: prior convict; comm/robbery Mit: outweighed
Cooper v. State 492 So.2d 1059 (Fla.1986)	DP	DP	Y	Y	Affirmed Death Penalty Struck comm/kidnap	Agg: comm/kidnap; avoid detection; CCP; HAC Mit: none
Marek v. State 492 So.2d 1055 (Fla.1986)	DP	DP	Y	O	Affirmed Death Penalty	Agg: contemp/kidnap; comm/robbery; HAC; pecuniary gain Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Garcia v. State 492 So.2d 360 (Fla.1986)	DP	DP	Y	O	Affirmed Death Penalty Proportionate	Agg: HAC; avoid detection Mit:
Dragovich v. State 492 So.2d 350 (Fla.1986)	DP	DP	X	X	New Sentencing with jury improper evidence introduced re: reputation to negate no significant history at penalty phase	
Nelson v. State 490 So.2d 32 (Fla.1986)	Life	DP	X	X	New trial-trial errors	
Woods v. State 490 So.2d 24 (Fla.1986)	DP	DP	N	O	Affirmed Death Penalty	Agg: under sent/imprison; disrupt law enforcement Mit: age (18 yrs)
Peek v. State 488 So.2d 52 (Fla.1986)	X	DP	N	N	New Trial	
Robinson v. State 487 So.2d 1040 (Fla.1986)	DP	DP	X	X	New Sentencing without jury due to disallowance of mit. instructions	
Ameson v. State 487 So.2d 8 (Fla.1986)	Life	DP	Y	N	Override Vacated Life Sentence-extreme emotional status; age	Agg: comm/rape/burglary/kidnap; avoid arrest; HAC; pecuniary gain Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Kelly v. State 492 So.2d 578 (Fla.1986)	DP	DP	N	O	Affirmed Death Penalty	Agg: prior convict; pecuniary gain; CCP Mit: Ct. found defendant only participated
Echols v. State 484 So.2d 568 (Fla.1985)	Life	DP	N	O	Affirmed Death Penalty (Jury Override)	Agg: CCP; pecuniary gain; comm/ robbery Mit: no significant history
Suarez v. State 481 So.2d 1201 (Fla.1985)	DP	DP	N	O	Affirmed Death Penalty	Agg: comm/robbery; avoid arrest; great risk; Mit: none
Walton v. State 481 So.2d 1197 (Fla.1985)	DP	DP	X	X	New Sentencing without jury due to improper admissions at penalty phase; Bruton	
Byrd v. State 481 So.2d 468 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty Proportionate	Agg: pecuniary gain; HAC; CCP Mit: no significant history
O'Connell v. State 480 So.2d 1279 (Fla.1985)	DP	DP	X	X	New trial-failure to grant challenge for cause	
Deaton v. State 480 So.2d 1279 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty	Agg: comm/robbery; HAC; CCP Mit: no significant history
Gardner v. State 480 So.2d 91 (Fla.1985)	DP	DP	X	X	New trial-failure to give intoxication defense	

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Toole v. State 479 So.2d 731 (Fla.1985)	DP	DP	N	N	Vacated Death Penalty New sentencing with jury failure to instruct on extreme emotional, etc.	Agg: comm/robbery; great risk; comm/arson
Burch v. State 522 So.2d 810 (Fla.1988) (new trial) 478 So.2d 1050 (Fla. 1985)	Life	DP	N	O	Override Vacated Resentenced to Life	Agg: under sent/imprison; prior felony; CCP Mit: mental capacity; impaired due to ingestation of drugs
Hill v. State 477 So.2d 553 (Fla.1985)	DP	DP	X	X	Death Penalty Vacated New Sentencing	
Hill v. State 515 So.2d 176 (Fla.1987) (Resentence)	DP	DP	N	Y	Affirmed Death Penalty Struck CCP	Agg: prior convict; great risk; CCP comm/robbery; avoid arrest Mit: age
Hooper v. State 476 So.2d 1253 (Fla.1985)	DP	DP	Y	Y	Affirmed Death Penalty Proportionate	Agg: prior convict; HAC; (2nd victim) avoid arrest; CCP Mit: served in military, salvation army, dedicated to christian principles
Phillips v. State 476 So.2d 194 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty	Agg: under sent/imprison; prior convict; HAC; CCP
Haliburton v. State 476 So.2d 192 (Fla.1985)	DP	DP	X	X	New trial-evid. admitted at trial	

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Cave v. State 476 So.2d 180 (Fla.1985)	DP	DP	Y	N	Affirmed Death Penalty	Agg: robbery; HAC; avoid arrest; kidnap Mit: none
Mills v. State 476 So.2d 172 (Fla.1985)	Life	DP	Y	Y	Affirmed Death Penalty Jury Override; STRUCK HAC; great risk; improper doubling	Agg: under sent/imprison; prior convict; great risk; felony murder burglary; pecunary gain; HAC Mit: none
Parker v. State 476 So.2d 134 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior convict; comm/kidnap/robbery; pecuniary gain; HAC; CCP Mit: age (19 yrs); good behavior at trial; victim not sexually molested
Bertolotti v. State 476 So.2d 130 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty Proportionate	Agg: prior convict; comm/robbery; HAC Mit: none
Roman v. State 475 So.2d 1228 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior convict; comm/sexual battery/kidnap; HAC Mit: capacity impaired; conform conduct
Gore v. State 475 So.2d 1205 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty Proportionate	Agg: under sent/imprison; comm/kidnap/sexual battery; avoid arrest; HAC; CCP Mit: none to outweigh agg.

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Huddleston v. State 475 So.2d 204 (Fla.1985)	Life	DP	X	X	Override Vacated Life Sentence Imposed	Agg: (unknown) Mit: number of mitigating factors
Gibson v. State 474 So.2d 1162 (Fla.1985)	DP	DP	X	X	New trial for competency hearing then new trial	
Ross v. State 474 So.2d 1170 (Fla.1985)	DP	DP	Y	O	Vacated Death Penalty Remand to Impose Life trial court failed to consid. mit. factors	Agg: HAC Mit: none (FSC: difficulty controlling emotions; no history of violence)
Hoffman v. State 474 So.2d 1178 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty HAC instruction not read to jury; trial court	Agg: prior convict; HAC; CCP Mit: no significant history; codefendant received life found-Ct. concurred
Peede v. State 474 So.2d 808 (Fla.1985)	DP	DP	N	O	Affirmed Death Penalty	Agg: prior convict; comm/kidnap; CCP Mit: defendant acted violent due to wife
Valle v. State 394 So.2d 1005 (Fla.1981) (new trial) 474 So.2d 796 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; avoid arrest; comm/flight/robbery Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Griffin v. State 474 So.2d 777 (Fla.1985)	DP	DP	N	O	Affirmed Death Penalty Struck CCP; prior convict; prevent arrest	Agg: prior convict; comm/flight/ robbery; avoid arrest; financial gain; CCP
Ferguson v. State 474 So.2d 208 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; CCP Mit: none
Stano v. State 473 So.2d 1282 (Fla.1985)	DP	DP	Y	N	Affirmed Death Penalty	Agg: prior feloy; HAC; CCP; comm/ kidnap Mit: none
Wright v. State 473 So.2d 1277 (Fla.1985)	DP	DP	Y	Y	Affirmed Death Penalty Struck CCP	Agg: avoid arrest; CCP; HAC; rape/ burglary Mit: none
Brown v. State 473 So.2d 1260 (Fla.1985)	Life	DP	Y	Y	Affirmed Death Penalty Struck CCP	Agg: under sent/imprison; comm burglary/sexual battery; pecuniary gain; HAC; CCP; prior violent felony Mit: none
Trawick v. State 473 So.2d 1235 (Fla.1985)	DP	DP	N	N	Remanded for Resentencing Struck great risk; no remorse	Agg: great risk; no remorse; (comm/ robbery; pecuniary gain-merged)
Francis v. State 473 So.2d 672 (Fla.1985)	Life	DP	Y	Y	Affirmed Death Penalty	Agg: hinder law enforcement; HAC; CCP Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Rose v. State 472 So.2d 1155 (Fla.1985)	DP	DP	N	N	Affirmed Death Penalty	Agg: prior felony; under sent/ imprison; CCP Mit: none
Oats v. State 472 So.2d 1143 (Fla.1985)	DP	DP	N	N	Affirmed Death Penalty	Agg: CCP; avoid arrest; robbery; prior felony Mit: age
Bundy v. State 471 So.2d 9 (Fla.1985)	DP	DP	Y	Y	Affirmed Death Penalty Struck HAC	Agg: under sent/imprison; HAC, comm/kidnap; prior felony Mit: none
Brown v. State 471 So.2d 6 (Fla.1985)	DP	DP	X	X	New trial-trial errors	
Patten v. State 467 So.2d 975 (Fla.1985)	DP	DP	N	N	Remanded for New Sentencing Reversible error	Agg: prior violence; avoid arrest; CCP; Mit: none
Burr v. State 466 So.2d 1051 (Fla.1985)	Life	DP	N	O	Affirmed Death Penalty	Agg: comm/robbery; avoid arrest; CCP Mit: none
Medina v. State 466 So.2d 1046 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty	Agg: pecuniary gain; HAC Mit: none
Johnson v. State 465 So.2d 499 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; CCP; avoid arrest Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Caruthers v. State 465 So.2d 496 (Fla.1985)	DP	DP	N	N	Vacated Death Penalty Struck 2 agg's	Agg: CCP; avoid arrest; comm/robbery Mit: no significant history
Bates v. State 465 So.2d 490 (Fla.1985)	DP	DP	N	N	Vacated Death Penalty-Remand Struck CCP; avoid arrest	Agg: CCP; avoid arrest; comm/sexual battery/kidnap; pecuniary gain Mit: some nonstatutory mitigation
Jackson v. State 464 So.2d 1181 (Fla.1985)	DP	DP	N	N	Reversed/Remanded reversible error	
Lara v. State 464 So.2d 1173 (Fla.1985)	DP	DP	N	O	Affirmed Death Penalty	Agg: CCP; prior felony; hinder law enforc. Mit: none
Koon v. State 463 So.2d 201 (Fla.1985)	DP	DP	N	N	New trial-reversible error	
Henderson v. State 463 So.2d 196 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; CCP; prior felony Mit: none
Randolph v. State 463 So.2d 186 (Fla.1984)	DP	DP	Y	N	Resentencing STRUCK HAC (robbery; pecuniary gain-merged)	Agg: comm/robbery; HAC; pecuniary gain; Mit: age; drug use

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Mills v. State 462 So.2d 1075 (Fla.1985)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; CCP; sent/imprison; comm/kidnap; pecuniary gain Mit: none
Duest v. State 462 So.2d 446 (Fla.1985)	DP	DP	Y	Y	Affirmed Death Penalty (Ct. found comm/robbery; pecuniary gain-merged)	Agg: CCP; HAC; prior felony; comm/robbery; pecuniary gain Mit: none
Troedel v. State 462 So.2d 392 (Fla.1984)	DP	DP	Y	Y	Affirmed Death Penalty Struck comm/burglary/robbery	Agg: comm/burglary/robbery; HAC; CCP Mit: none
Bush v. State 461 So.2d 936 (Fla.1984)	DP	DP	N	O	Affirmed Death Penalty	Agg: comm/kidnap/robbery Mit: none
Rose v. State 461 So.2d 84 (Fla.1984)	DP	DP	N	O	Affirmed Death Penalty	Agg: prior felony; sent/imprison; kidnap Mit: none
Hardwick v. State 461 So.2d 79 (Fla.1984)	DP	DP	N	Y	Affirmed Death Penalty Struck CCP	Agg: comm/felony; CCP; prior felony; pecuniary gain Mit: none
Davis v. State 461 So.2d 67 (Fla.1984)	DP	DP	Y	Y	Affirmed Death Penalty Struck avoid arrest	Agg: HAC; CCP; prior felony; sent/imprison; avoid arrest; comm/burglary Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Stano v. State 460 So.2d 890 (Fla.1984)	DP	DP	Y	O	Affirmed Death Penalty	Agg: comm/kidnap; CCP; HAC Mit: difficult childhood; marital problems; confessions; guilty pleas
Doyle v. State 460 So.2d 353 (Fla.1984)	DP	DP	Y	Y	Affirmed Death Penalty Struck avoid arrest	Agg: comm/sexual battery; HAC; avoid arrest Mit: none
Rivers v. State 458 So.2d 762 (Fla.1984)	Life	DP	N	N	Remanded for Life Struck avoid arrest	Agg: avoid arrest; great risk; pecuniary gain Mit: no significant history
Eutzy v. State 458 So.2d 755 (Fla.1984)	Life	DP	Y	Y	Affirmed Death Penalty STRUCK HAC; robbery	Agg: robbery; prior felony; avoid arrest; HAC; pecuniary gain; CCP Mit: none
Livingston v. State 458 So.2d 235 (Fla.1984)	X	DP	X	X	New trial	
Groover v. State 458 So.2d 226 (Fla.1984)	Life	DP	Y	O	Affirmed Death Penalty	Agg: prior felony; kidnapping; HAC; CCP Mit: none
Copeland v. State 457 So.2d 1012 (Fla.1984)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; comm/kidnap/rape; pecuniary gain; prior felony; avoid arrest Mit: age

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Lemon v. State 456 So.2d 885 (Fla.1984)	Life	DP	Y	O	Affirmed Death Penalty	Agg: HAC; prior felony Mit: acute emotional disturbance
Thomas v. State 456 So.2d 454 (Fla.1984)	Life	DP	Y	O	Affirmed Death Penalty	Agg: CCP; prior felony; HAC; eliminate witness Mit: none
Thompson v. State 456 So.2d 444 (Fla.1984)	Life	DP	X	N	Vacated for Life Struck CCP; Ct found: mental retardation; personality disorder)	Agg: CCP; avoid arrest; prior felony Mit: none
Parker v. State 456 So.2d 436 (Fla.1984)	DP	DP	N	O	Affirmed Death Penalty	Agg: CCP; sent/imprison; prior felony flight/sexual battery; pecuniary gain Mit: none
Kennedy v. State 455 So.2d 354 (Fla.1984)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC; CCP hinder law enforc; avoid arrest-merged)	Agg: HAC; avoid arrest; sent/imprison; comm/felony; CCP; prior felony; hinder law enforcement Mit: one
Bundy v. State 455 So.2d 330 (Fla.1984)	DP	DP	Y	O	Affirmed Death Penalty	Agg: comm/burglary; sent/imprison; HAC; prior felony Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Gorham v. State 454 So.2d 556 (Fla.1984)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC; CCP	Agg: sent/imprison; HAC; CCP; comm/felony Mit: none
Jennings v. State 453 So.2d 1109 (Fla.1984)	DP	DP	Y	O	Affirmed Death Penalty	Agg: kidnap/rape/burglary; CCP Mit: none
James v. State 453 So.2d 786 (Fla.1984)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC	Agg: HAC; CCP; prior felony; avoid arrest burglary/robbery Mit: none
Mann v. State 453 So.2d 784 (Fla.1984)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior felony; kidnap; HAC Mit: emotional disturbance
Morgan v. State 453 So.2d 394 (Fla.1984)	X	DP	X	X	New trial	
Brumbley v. State 453 So.2d 381 (Fla.1984)	DP	DP	X	X	Death Penalty Vacated; Resentencing without jury on whether death eligible under *Enmund v. Florida*, 458 U.S. 782 (1982)	
Card v. State 453 So.2d 17 (Fla.1984)	DP	DP	Y	O	Affirmed Death Penalty	Agg: CCP; avoid arrest; pecuniary gain; comm/kidnap/robbery; HAC Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Atkins v. State 452 So.2d 529 (Fla.1984)	DP	DP	X	X	Resentencing with jury	
Blanco v. State 452 So.2d 520 (Fla.1984)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC; CCP	Agg: premed; burglary/pecuniary; HAC; CCP Mit: none
Gurganus v. State 451 So.2d 817 (Fla.1984)	DP	DP	X	X	New Trial	
Jackson v. State 451 So.2d 458 (Fla.1984)	DP	DP	Y	N	New Trial STRUCK HAC	Agg: HAC Mit: none
Squires v. State 450 So.2d 208 (Fla.1984)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior felony; escapee; HAC; CCP Mit: none
Bassett v. State 449 So.2d 803 (Fla.1984)	DP	DP	Y	Y	Affirmed Death Penalty Struck great risk	Agg: prior felony; HAC; robbery/kidnap; great risk Mit: none
Jones v. State 449 So.2d 253 (Fla.1984)	DP	DP	N	O	Affirmed Death Penalty	Agg: pecuniary gain; robbery/burglary Mit: none
Heiney v. State 447 So.2d 210 (Fla.1984)	Life	DP	Y	O	Affirmed Death Penalty	Agg: HAC; robbery; sent/imprison Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Herring v. State 446 So.2d 1049 (Fla.1984)	DP	DP	N	O	Affirmed Death Penalty	Agg: CCP; avoid arrest; prior felony; Mit: age; difficult childhood; learning disabilities
Lusk v. State 446 So.2d 1038 (Fla.1984)	Life	DP	Y	Y	Affirmed Death Penalty STRUCK HAC; great risk	Agg: HAC; great risk; prior felony; sent/imprison Mit: none
White v. State 446 So.2d 1031 (Fla.1984)	DP	DP	N	Y	Affirmed Death Penalty Struck CCP robbery; pecuniary gain-merged)	Agg: CCP; prior felony; robbery; pecuniary gain Mit: none
Oats v. State 446 So.2d 90 (Fla.1984)	DP	DP	Y	N	New Sentencing; STRUCK HAC; (Ct. found (pecuniary gain robbery-merged)	Agg: HAC; CCP; avoid arrest; pecuniary gain; robbery Mit: age
Rembert v. State 445 So.2d 337 (Fla.1984)	Life	DP	Y	N	Vacated for Life; STRUCK HAC; CCP; avoid arrest	Agg: comm/felony; CCP; HAC; avoid arrest Mit: none
Agan v. State 445 So.2d 326 (Fla.1983)	DP	DP	N	O	Affirmed Death Penalty	Agg: sent/imprison; prior felony Mit: none
Preston v. State 444 So.2d 939 (Fla.1984)	DP	DP	Y	Y	Affirmed Death Penalty Struck CCP	Agg: prior felony; robbery; HAC; CCP Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Sims v. State 444 So.2d 922 (Fla.1983)	DP	DP	Y	Y	Affirmed Death Penalty (Ct. found avoid arrest; hinder law enforcement-merged)	Agg: prior felony; great risk; HAC; flight; pecuniary gain; avoid arrest; hinder law enforc. Mit: none
Clark v. State 443 So.2d 973 (Fla.1983)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC	Agg: prior felony; burglary/robbery; avoid arrest; HAC; CCP Mit: none
Maxwell v. State 443 So.2d 967 (Fla.1983)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC; CCP robbery; pecuniary gain-merged)	Agg: prior felony; HAC; CCP; robbery; pecuniary gain Mit: none
Bottoson v. State 443 So.2d 962 (Fla.1983)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior felony; comm/felony; HAC; avoid arrest Mit: none
Andrews v. State 443 So.2d 78 (Fla.1983)	X	DP	X	X	Vacated-New Trial	
Peavy v. State 442 So.2d 200 (Fla.1983)	DP	DP	Y	N	Resentencing Struck CCP	Agg: CCP; HAC; prior convict; comm/felony Mit: age; no significant history
Johnson v. State 442 So.2d 193 (Fla.1983)	DP	DP	N	O	Affirmed Death Penalty	Agg: CCP; avoid arrest; robbery/pecuniary; sent/imprison; prior felony Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Johnson v. State 442 So.2d 185 (Fla.1983)	DP	DP	N	O	Affirmed Death Penalty	Agg: prior felony; robbery/pecuniary; avoid arrest Mit: none
Chandler v. State 442 So.2d 171 (Fla.1983)	DP	DP	X	N	Vacated Death Penalty Witherspoon violation	
Livingston v. State 441 So.2d 1083 (Fla.1983)	DP	DP	X	X	New Trial	
Drake v. State 441 So.2d 1079 (Fla.1983)	DP	DP	X	X	New Trial	
Pope v. State 441 So.2d 1073 (Fla.1983)	DP	DP	Y	Y	Affirmed Death Penalty Struck lack of remorse	Agg: prior felony; avoid arrest; HAC; CCP Mit: none
Perri v. State 441 So.2d 606 (Fla.1983)	DP	DP	X	X	New Sentencing needs psychiatric exam	
Routly v. State 440 So.2d 1257 (Fla.1983)	DP	DP	Y	O	Affirmed Death Penalty	Agg: robbery/burglary/kidnap; avoid arrest; HAC; CCP; pecuniary gain Mit: none
Delap v. State 440 So.2d 1242 (Fla.1983)	DP	DP	Y	O	Affirmed Death Penalty	Agg: sent/imprison; prior felony; great risk; kidnap/robbery/rape; HAC Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Jones v. State 440 So.2d 570 (Fla.1983)	DP	DP	N	O	Affirmed Death Penalty	Agg: prior felony; CCP; hinder law enforc. Mit: none
Herzog v. State 439 So.2d 1372 (Fla.1983)	Life	DP	Y	N	Vacated Death Penalty STRUCK HAC; CCP; avoid arrest	Agg: prior felony; HAC; avoid arrest; CCP Mit:
Teffeteller v. State 439 So.2d 840 (Fla.1983)	DP	DP	Y	N	Vacated Death Penalty; new sentencing with jury due to reversible error for not giving curative instruction	Agg: prior felony; sent/imprison; HAC; robbery Mit: none
Engle v. State 438 So.2d 803 (Fla.1983)	Life	DP	X	X	Vacated Death Penalty; new sentencing based on Bruton problem	
Harris v. State 438 So.2d 787 (Fla.1983)	DP	DP	Y	Y	Affirmed Death Penalty Struck CCP	Agg: HAC; CCP; prior sent; robbery/burglary; prior felony Mit: none
Williams v. State 438 So.2d 781 (Fla.1983)	DP	DP	N	Y	Affirmed Death Penalty	Agg: sent/imprison; prior felony Mit: none
Johnson v. State 438 So.2d 774 (Fla.1983)	DP	DP	N	O	Affirmed Death Penalty	Agg: great risk; CCP; pecuniary gain; avoid arrest; felony murder Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Lightbourne v. State 438 So.2d 380 (Fla.1983)	DP	DP	Y	O	Affirmed Death Penalty	Agg: burglary/sexual battery; HAC; avoid arrest; pecuniary gain Mit: none
Mason v. State 438 So.2d 374 (Fla.1983)	DP	DP	Y	Y	Affirmed Death Penalty Struck great risk	Agg: CCP; great risk; HAC; prior felony Mit: none
Justus v. State 438 So.2d 358 (Fla.1983)	DP	DP	N	O	Affirmed Death Penalty	Agg: robbery/kidnap/sexual battery; CCP Mit: none
Richardson v. State 437 So.2d 1091 (Fla.1983)	Life	DP	N	N	Vacate to Life Struck CCP	Agg: 6 factors Mit: none
Huff v. State 437 So.2d 1087 (Fla.1983)	X	DP	X	X	New trial-trial errors	
Harich v. State 437 So.2d 1082 (Fla.1983)	DP	DP	Y	O	Affirmed Death Penalty	Agg: sexual battery; avoid arrest; HAC; CCP Mit: no significant history
Fitzpatrick v. State 437 So.2d 1072 (Fla.1983)	DP	DP	N	O	Affirmed Death Penalty	Agg: kidnap; prior felony; sent/imprison; avoid arrest; pecuniary gain; great risk Mit: none
Michael v. State 437 So.2d 138 (Fla.1983)	DP	DP	Y	O	Affirmed Death Penalty	Agg: pecuniary gain; CCP; HAC Mit: no significant history

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Williams v. State 437 So.2d 133 (Fla.1983)	DP	DP	N	O	Affirmed Death Penalty	Agg: prior felony; sent/imprison Mit: none
Wilson v. State 436 So.2d 908 (Fla.1983)	DP	DP	Y	Y	Affirmed Death Penalty Struck CCP	Agg: CCP; HAC; prior felony Mit: none
Foster v. State 436 So.2d 56 (Fla.1980)	DP	DP	N	N	Vacated Death Penalty Resentencing Struck 2 Agg's	Agg: robbery; avoid arrest; hinder law enforc. Mit: no significant history; age
King v. State 436 So.2d 50 (Fla.1983)	DP	DP	Y	Y	Affirmed Death Penalty Struck CCP	Agg: HAC; CCP Mit: none
Hawkins v. State 436 So.2d 44 (Fla.1983)	Life	DP	O	N	Vacate Death Penalty Override Sentenced to Life	
Spaziano v. State 433 So.2d 508 (Fla.1983)	Life	DP	Y	O	Affirmed Death Penalty	Agg: HAC; prior felony Mit: none
Webb v. State 433 So.2d 496 (Fla.1983)	Life	DP	X	N	Vacate Death Penalty Override Sentenced to Life	
Washington v. State 432 So.2d 44 (Fla.1983)	Life	DP	N	O	Vacated DP Override Remanded to Life	Agg: CCP; avoid arrest; hinder law enforc. Mit: no significant history; age

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
O'Callaghan v. State 429 So.2d 691 (Fla.1983)	DP	DP	N	Y	Affirmed Death Penalty	Agg: CCP; prior felony Mit: none
Norris v. State 429 So.2d 688 (Fla.1983)	Life	DP	N	N	Vacated DP Override Sentenced to Life	Agg: burglary; pecuniary Mit: age; drug problems; intoxication
Magill v. State 429 So.2d 649 (Fla.1980)	DP	DP	Y	O	Affirmd Death Penalty	Agg: 4 Mit: 3
Waterhouse v. State 429 So.2d 301 (Fla.1983)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior felony; sent/imprison; sexual battery; avoid arrest; HAC Mit: none
Porter v. State 429 So.2d 293 (Fla.1983)	DP	DP	Y		Affirmed Death Penalty Override	Agg: robbery/pecuniary; avoid arrest; HAC Mit: none
Cannady v. State 427 So.2d 723 (Fla.1982)	Life	DP	N	N	Vacated Override; Sentenced to Life; S truck CCP	Agg: kidnap; pecuniary; CCP Mit: none
Middleton v. State 426 So.2d 548 (Fla.1982)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC	Agg: prior felony; sent/imprison; pecuniary gain; HAC Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Rose v. State 425 So.2d 521 (Fla.1982)	DP	DP	X	Y	Vacated Override; Resentencing due to jury instruction; Remand for new sentence as to meaning; 6-6 tie	
Smith v. State 424 So.2d 726 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; CCP; avoid arrest; robbery/pecuniary; kidnap/sexual battery; prior felony Mit: age
Bolander v. State 422 So.2d 833 (Fla.1982)	Life	DP	Y	Y	Affirmed Death Penalty Struck under sentence; great risk	Agg: robbery/kidnap; great risk; HAC; pecuniary gain; CCP; avoid arrest; hinder law enforc.; under sentence Mit: none
Hill v. State 422 So.2d 816 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; CCP Mit: none
McCampbell v. State 421 So.2d 1072 (Fla.1982)	Life	DP	N	N	Vacate Override Sentenced to Life	Agg: sent/imprison; prior felony; robbery Mit: none
Stewart v. State 420 So.2d 862 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty	Agg: sent/imprison; prior felony; HAC; pecuniary gain; felony murder Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Scott v. State 420 So.2d 595 (Fla.1982)	DP	DP	X	X	Vacated-Competency Hearing	
Martin v. State 420 So.2d 583 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty	Agg: kidnap; avoid arrest; HAC; prior felony; sent/imprison Mit: none
Mann v. State 420 So.2d 579 (Fla.1982)	DP	DP	Y	N	Vacated Death Sentence; Remanded for resentencing due to unclear ct. order; STRUCK HAC	Agg: prior convict; comm/felony; HAC; CCP Mit: possible mental mitigation
Anderson v. State 420 So.2d 574 (Fla.1982)	DP	DP	X	O	Vacated-New Trial	
Daugherty v. State 419 So.2d 1067 (Fla.1982)	DP	DP	N	O	Affirmed Death Penalty	Agg: prior felony; pecuniary gain Mit: none
Stevens v. State 419 So.2d 1058 (Fla.1982)	Life	DP	Y	O	Affirmed Death Penalty Override	Agg: HAC; pecuniary gain; avoid arrest; kidnap/sexual battery Mit: none
Simmons v. State 419 So.2d 316 (Fla.1982)	DP	DP	Y	N	New Sentencing Struck pecuniary gain	Agg: pecuniary gain; HAC; prior felony Mit: none
Sturdivan v. State 419 So.2d 300 (Fla.1982)	DP	DP	X	X	New trial	

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Walsh v. State 418 So.2d 1000 (Fla.1982)	Life	DP	N	N	Vacated Override Remand to Life	Agg: prior felony; CCP; avoid arrest Mit: none
Gilvin v. State 418 So.2d 996 (Fla.1982)	Life	DP	X	X	Vacated Override Reverse to Life	
Moody v. State 418 So.2d 989 (Fla.1982)	DP	DP	Y	N	Vacated Sentence; Remanded for new sentence without jury; Struck arson/flight	Agg: arson/flight; pecuniary gain; HAC Mit: no significant history
Simpson v. State 418 So.2d 984 (Fla.1982)			DP	X	X	New trial
Coler v. State 418 So.2d 238 (Fla.1982)			DP	X	X	New trial
Ferguson v. State 417 So.2d 639 (Fla.1982)	DP	DP	Y	N	Vacated Struck 2 agg's	Agg: great risk; sent/imprison; prior felony; HAC; avoid arrest; robbery Mit: none
Ferguson v. State 417 So.2d 631 (Fla.1982)	DP	DP	Y	N	Remand for Approp. Sentence Struck sent/imprison	Agg: HAC; prior felony; sent/imprison Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Jaramillo v. State 417 So.2d 257 (Fla.1982)	DP	DP	X	X	Remand to trial court to discharge; Insufficient evid. to support conviction	
McCray v. State 416 So.2d 804 (Fla.1982)	Life	DP	Y	N	Resentence to Life STRUCK HAC; CCP; pecuniary gain	Agg: HAC; CCP; pecuniary gain Mit: none
Miller v. State 415 So.2d 1262 (Fla.1982)	Life	DP		N	Affirmed Death Penalty	Agg: cited codefendant case for agg's *Jent v. State*, 408 So.2d 1024 (Fla. 1981) Mit: none
White v. State 415 So.2d 719 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; kidnap; avoid arrest Mit: no significant history
Morgan v. State 415 So.2d 6 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty	Agg: sent/imprison; HAC; prior felony Mit: none
Griffin v. State 414 So.2d 1025 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; avoid arrest; robbery; parole; prior felony Mit: none
Quince v. State 414 So.2d 185 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty	Agg: rape, pecuniary gain; HAC Mit: substantial impairment

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Francis v. State 413 So.2d 1175 (Fla.1982)	X	DP	X	X	New trial	
Hitchcock v. State 413 So.2d 741 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; avoid arrest; sexual battery Mit: age
Jennings v. State 413 So.2d 24 (Fla.1982)	X	DP	X	X	New trial	
Breedlove v. State 413 So.2d 1 (Fla.1982)	DP	DP	Y	N	Affirmed Death Penalty	Agg: burglary; HAC; prior felony Mit: none
Adams v. State 412 So.2d 850 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; avoid arrest; rape/kidnap Mit: emotional disturb; no sign. history; age
Bryant v. State 412 So.2d 347 (Fla.1982)	DP	DP	X	X	New Trial	Agg: robbery
Steinhorst v. State 412 So.2d 332 (Fla.1982)	Life	DP	Y	O	Affirmed Death Penalty Override	Agg: HAC; kidnap Mit: no significant history
Scott v. State 411 So.2d 866 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty	Agg: robbery/pecuniary; parole; prior felony; HAC Mit: none
Arango v. State 411 So.2d 172 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC Mit: no significant history

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Jones v. State 411 So.2d 165 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty	Agg: sent/imprison; prior felony; robbery; HAC; hinder law enforcement Mit: none
Vaught v. State 410 So.2d 147 (Fla.1982)	DP	DP	Y	O	Affirmed Death Penalty robbery; pecuniary gain-merged)	Agg: robbery; pecuniary; avoid arrest; HAC Mit: age; no significant history
Jent v. State 408 So.2d 1024 (Fla.1981)	DP	DP	Y	O	Affirmed Death Penalty	Agg: CCP; HAC Mit: none
Smith v. State 407 So.2d 894 (Fla.1981)	DP	DP	Y	O	Affirmed Death Penalty	Agg: hinder law enforc; HAC Mit: none
Francois v. State 407 So.2d 885 (Fla.1981)	DP	DP	Y	Y	Affirmed Death Penalty Struck great risk FSC: improper doubling	Agg: HAC; prior felony; great risk; robbery; pecuniary gain; avoid arrest; hinder law enforcement Mit: none
Christopher v. State 407 So.2d 198 (Fla.1981)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior felony; HAC Mit: none
Blair v. State 406 So.2d 1103 (Fla.1981)	DP	DP	N	N	Death Penalty Vacated; Remand to Life; Struck great risk	Agg: great risk; avoid arrest Mit: no significant history

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Goodwin v. State 405 So.2d 170 (Fla.1981)	Life	DP	N	X	Vacated Override Remand to Life	
Hall v. State 403 So.2d 1321 (Fla.1981)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; prior felony; kidnap/robbery Mit: none
Hall v. State 403 So.2d 1319 (Fla.1981)	X	DP	X	X	Remand to 2nd degree murder conviction	
(a/k/a Gordon) Franklin v. State 403 So.2d 975 (Fla.1981)	X	DP	X	X	New trial	
Buford v. State 403 So.2d 943 (Fla.1981)	DP	DP	Y	O	Affirmed Death Penalty	Agg: sexual battery; HAC Mit: age
McKennon v. State 403 So.2d 389 (Fla.1981)	Life	DP	Y	N	Vacated Override Reduced to Life	Agg: HAC Mit: age
Stokes v. State 403 So.2d 377 (Fla.1981)	Life	DP	Y	N	Vacated Override Resentencing to Life	Agg: robbery; kidnap; HAC Mit: no significant history
Thomas v. State 403 So.2d 371 (Fla.1981)	X	DP	X	X	New trial	

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Odom v. State 403 So.2d 936 (Fla.1981)	Life	DP	N	X	Vacated Override; Resentenced to Life; Ct. held: State failed to establish any aggravating factors	Agg: none
Smith v. State 403 So.2d 933 (Fla.1981)	Life	DP	N	N	Vacated Override Remand to Life	
Combs v. State 403 So.2d 418 (Fla.1981)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; robbery; CCP Mit: none
Tafero v. State 403 So.2d 355 (Fla.1981)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC; great risk	Agg: great risk; parole violation; prior felony; avoid arrest; robbery; HAC; hinder law enforcement Mit: none
White v. State 403 So.2d 331 (Fla.1981)	Life	DP	Y	Y	Override Affirmed Death Penalty Struck great risk; avoid arrest-pecuniary gain	Agg: robbery; HAC; prior felony; great risk; sent/imprison; avoid arrest; hinder law enforcement Mit: none
Welty v. State 402 So.2d 1159 (Fla.1981)	Life	DP	N	N	Vacated Override Resentence to Life Doubling struck burglary and pecuniary gain	Agg: burglary; pecuniary gain; great risk Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Barfield v. State 402 So.2d 377 (Fla.1981)	Life	DP	N	N	Vacated Override Remand for Life	Agg: pecuniary gain Mit: none
Zeigler v. State 402 So.2d 365 (Fla.1981)	Life	DP	Y	Y	Affirmed DP Override STRUCK HAC	Agg: HAC; pecuniary gain; great risk; avoid arrest Mit: no significant history
Drake v. State 400 So.2d 1217 (Fla.1981)	X	DP	X	X	New Trial	
Porter v. State 400 So.2d 5 (Fla.1981)	Life	DP	N	N	New Sentencing	Agg: robbery/pecuniary gain; avoid arrest Mit:
Enmund v. State 399 So.2d 1362 (Fla.1981)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC	Agg: robbery/pecuniary; prior felony; HAC Mit: none
Maggard v. State 399 So.2d 973 (Fla.1981)	DP	DP	Y	N	Vacated Death Penalty; new sentencing with jury; STRUCK HAC; (Ct. found burglary; pecuniary gain-merged)	Agg: burglary; pecuniary gain; HAC Mit: none
Sireci v. State 399 So.2d 964 (Fla.1981)	DP	DP	Y	O	Affirmed Death Penalty	Agg: HAC; avoid arrest; robbery Mit: none
Armstrong v. State 399 So.2d 953 (Fla.1981)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC	Agg: HAC; robbery; pecuniary Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Lewis v. State 398 So.2d 432 (Fla.1981)	Life	DP	Y	N	Vacated DP Override; new sentence with jury for reconsideration of sentence; STRUCK HAC; great risk; prior felony	Agg: sent/imprison; HAC; great risk; prior felony Mit: none
Booker v. State 397 So.2d 910 (Fla.1981)	DP	DP	Y	O	Affirmed Death Penalty	Agg: sent/imprison; prior felony; sexual battery; avoid arrest; HAC Mit: none
Straight v. State 397 So.2d 903 (Fla.1981)	DP	DP	Y	O	Affirmed Death Penalty	Agg: sent/imprison; flight; robbery; HAC Mit: none
Palmes v. State 397 So.2d 648 (Fla.1981)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior felony; robbery; pecuniary gain; HAC Mit: none
Ruffin v. State 397 So.2d 277 (Fla.1981)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior capital felony; robbery; HAC Mit: none
Jacobs v. State 396 So.2d 1113 (Fla.1981)	DP	DP	Y	Y	Affirmed Death Penalty (Ct. found robbery; pecuniary gain-merged)	Agg: robbery; pecuniary gain; avoid arrest; HAC Mit: no significant history

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Jacobs v. State 396 So.2d 713 (Fla.1981)	Life	DP	N	N	Vacated Override; Resentence to Life; Struck great risk	Agg: great risk; avoid arrest; hinder law enforcement Mit: none
McCrae v. State 395 So.2d 1145 (Fla.1980)	Life	DP	Y	N	Affirmed DP Override	Agg: prior felony; rape; HAC Mit: none
Demps v. State 395 So.2d 501 (Fla.1981)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC; avoid arrest	Agg: HAC; avoid arrest; prior felony; prior capital convict. Mit: none
Peek v. State 395 So.2d 492 (Fla.1981)	DP	DP	Y	Y	Affirmed Death Penalty Struck pecuniary gain;	Agg: pecuniary gain; HAC; prior felony; sexual battery under probation Mit: none
Perry v. State 395 So.2d 170 (Fla.1980)	X	DP	N	N	Vacated Death Penalty; new sentencing with jury because ct. may have limited consideration of mitigation (Ct. found pecuniary gain; robbery-merged)	Agg: pecuniary gain; robbery; prior felony Mit: none
Spaziano v. State 393 So.2d 1119 (Fla.1981)	Life	DP	Y	N	Resentencing Vacated D.P.	Agg: HAC; prior felony Mit: none
Johnson v. State 393 So.2d 1069 (Fla.1980)	Life	DP	Y	Y	Affirmed Death Penalty Struck great risk	Agg: great risk; prior felony; kidnap;HAC Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Malone v. State 390 So.2d 338 (Fla.1980)	DP	DP	X	X	Reversed and Remanded based on U.S. v. Henry, 477 U.S. 264 (1980)	
Mines v. State 390 So.2d 332 (Fla.1980)	Waived Jury	DP	Y	N	Vacated Death Penalty Resentencing without jury Struck great risk	Agg: great risk; kidnap; HAC Mit: no significant history
King v. State 390 So.2d 315 (Fla.1980)	DP	DP	Y	O	Affirmed Death Penalty	Agg: prior felony; sent/imprison; arson/great risk; burglary; HAC; separate stabbing Mit: age
Phippen v. State 389 So.2d 991 (Fla.1980)	Life	DP	Y	N	Vacated Override Life Sentence Imposed Struck pecuniary gain	Agg: pecuniary gain; HAC Mit: none
Thompson v. State 389 So.2d 197 (Fla.1980)	DP	DP	Y	O	Affirmed Death Penalty	Agg: kidnap; sexual battery; HAC Mit: no significant history; age
Gafford v. State 387 So.2d 333 (Fla.1980)	DP	DP	Y	N	Resentencing Improper doubling	Agg: HAC; robbery; pecuniary Mit: no significant history; age

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Ross v. State 386 So.2d 1191 (Fla.1980)	DP	DP	Y	N	Vacated Death Penalty; Remand for reconsideration because ct. gave undue weight to jury's recommendation; Struck pecuniary gain; comm/robbery	Agg: HAC; avoid arrest; robbery; pecuniary gain Mit: age; limited intelligence
Magill v. State 386 So.2d 1188 (Fla.1980)	DP	DP	N	O	Resentencing-no written findings without jury	
Downs v. State 386 So.2d 788 (Fla.1980)	DP	DP	N	N	Affirmed Death Penalty	Agg: pecuniary gain; prior felony Mit: none
Williams v. State 386 So.2d 538 (Fla.1980)	Life	DP	Y	Y	Resentenced to Life STRUCK HAC; great risk; prior felony	Agg: prior felony; great risk; HAC; hinder law enforcement Mit: none
Shriner v. State 386 So.2d 525 (Fla.1980)	DP	DP	N	O	Affirmed Death Penalty	Agg: prior felony; comm/robbery Mit: possible mit: capacity to appreciate actions
Neary v. State 384 So.2d 881 (Fla.1980)	Life	DP	N	O	Vacated DP Override; Remand for Life Sentence; (Ct. found: age; slow learner; family situation	Agg: comm/burglary; pecuniary gain; avoid arrest; HAC Mit: none

NAME	JURY-RECOM	JUDGE	HAC	HARMLESS	FSC	SENTENCING FACTORS
Antone v. State 382 So.2d 1205 (Fla.1980)	DP	DP	Y	Y	Affirmed Death Penalty STRUCK HAC	Agg: prior felonies; pecuniary gain; HAC Mit: none
Brown v. State 381 So.2d 690 (Fla.1980)	DP	DP	N	O	Affirmed Death Penalty Struck great risk; Improper doubling	Agg: great risk; comm/felony/rape/robbery; pecuniary gain Mit: none

FOR ARGUMENT

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Supreme Court of the United States

October Term, 1991

DENNIS SOCHOR,

Petitioner,

vs.

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STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Florida

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I. INADEQUACY OF APPELLATE REVIEW

A. As an initial matter, Mr. Sochor notes that the state's brief considerably simplifies the issues as follows:

First, the state has not contended that the Supreme Court of Florida reweighed sentencing circumstances.

Second, the state has not disputed Mr. Sochor's contention that, had there been a life verdict, Florida law would have required a life sentence.

Third, the state has agreed at page 19 of its brief that the *Tedder*[1] doctrine applies to death verdict cases: that is, that under *Grossman v. State*, 525 So.2d 833 (Fla.), *cert. denied*, 489 U.S. 1071 (1989), the trial court must give great deference to the death verdict in reaching its sentencing decision. The parties are in agreement as to the centrality, as a matter of law, of the penalty verdict in Florida's death sentencing scheme.

Fourth, the state has in effect agreed at page 7 of its brief that the state supreme court's appellate review differs substantially depending on whether there has been a life verdict.

Fifth, the state has not disputed that, under *Parker v. Dugger*, 111 S.Ct. 731 (1991), harmless error review is required where the state supreme court has struck an aggravating circumstance.

B. The state's argument is that the state supreme court's harmless error analysis was constitutionally adequate. Although the state agrees that the supreme court's

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[1] *Tedder v. State*, 322 So.2d 908 (Fla.1975).

review was highly deferential (state's brief, page 24: "the Court properly refused to second-guess the trial court's written order" respecting mitigation),[2] the state contends that the court's harmless error analysis was sufficient. In making this contention, the state does not explain how the Supreme Court of Florida's analysis differed from that of the Mississippi Supreme Court in *Clemons v. Mississippi*, 494 U.S. 738 (1990), or that of the Supreme Court of Florida in *Parker*.[3] Further, since the parties agree that, through *Grossman*, the *Tedder* rule of great deference to the penalty verdict applies equally to life recommendations and to death recommendations, adequate harmless error analysis requires examination of the effect of the error on the jury. Under *Yates v. Evatt*, 111 S.Ct. 1884 (1991), therefore, the reviewing court must consider all of the evidence presented to the jury. This the supreme court did not do. Hence, its decision at bar cannot stand.

C. To the extent that the state argues at page 12 of its brief that the state court reverses only where an error affects the evidence before the jury, it simply ignores

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[2] The state has not disputed that the supreme court's review of findings regarding aggravating circumstances in death recommendation cases is similarly deferential. *See Wickham v. State*, 16 Fla. L. Week. S777 (Fla. Dec. 12, 1991) (abuse of discretion standard applies to review of determination of aggravating circumstance). Florida's abuse of discretion standard requires affirmance except where the judge's decision is "arbitrary, fanciful, or unreasonable." *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla.1980).

[3] Insofar as the state relies on *Walton v. Arizona*, 110 S.Ct. 3047 (1990) to avoid *Clemons*, it ignores the fact that Arizona is not a "weighing" state so that *Clemons* does not apply to it. *See Richmond v. Lewis*, 948 F.2d 1473 (9th Cir.1990).

cases such as *Stewart v. State*, 558 So.2d 416 (Fla.1990). In *Stewart*, the defense presented testimony that the defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, but that the impairment was not "substantial."[4] Although the jury was instructed that it could consider all nonstatutory mitigating circumstances,[5] the supreme court reversed, holding that the trial court had erred by not instructing the jury on the statutory circumstance of substantial impairment. Thus, although the error affected neither the evidence presented to the jury nor the jury's consideration of the evidence, the court ordered reversal solely because there was one less *circumstance* for the jury to consider.

Stewart rests on the proposition that the Florida jury weighs circumstances rather than evidence. The court reaffirmed this approach in *Dougan v. State*, 17 Fla. L. Week. S10 (Fla. Jan. 2, 1992). There the court rejected Dougan's argument that the jury can render a life verdict even where it finds sufficient aggravating circumstances to justify a death sentence and insufficient mitigating circumstances to overcome them. Noting that the statutory scheme of sentencing circumstances restrains and restricts the jury's discretion, the court said that Dougan's argument would allow the jury "to disregard the statutory directions and guidance" so as to "engender

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[4] Substantial impairment of one's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is a statutory mitigating circumstance under section 921.141(6)(e), Florida Statutes.

[5] 558 So.2d at 422 (Grimes, J., dissenting).

arbitrariness and capriciousness in jury recommendations." *Id.* S11.

II. "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE

A. Again, the state has substantially narrowed the issue by its agreement concerning the importance of the jury in Florida capital sentencing proceedings. Further, the state has not contended that the language of the "heinous, atrocious or cruel" aggravating circumstance is facially constitutional. The state seems to agree that the circumstance is constitutional only to the extent that the state court hews to the *Proffitt*[6] construction (or at least the *State v. Dixon*[7] construction).[8]

B. At footnote 24 of its brief, the state contends that Mr. Sochor was precluded from challenging the jury instruction on appeal and that the only question preserved for appeal was whether the heinousness circumstance was proven beyond a reasonable doubt. It further asserts there that he was barred from arguing "whether Florida applies its HAC aggravating factor in a constitutional manner based on the instruction given." See also footnote 32 of the state's brief. However, the state makes no explicit argument that the Supreme Court

---

[6] *Proffitt v. Florida*, 428 U.S. 242 (1976).

[7] 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943 (1974).

[8] The state also apparently agrees that there was no evidence that Mr. Sochor dragged Ms. Gifford from the truck. See the state's discussion of the facts at page 23 of its brief.

of Florida declined to reach the merits of the jury instruction issue; nor can such an argument be made.

The Supreme Court of Florida would be astounded to learn that it did not reach the merits of the jury instruction issues. It has twice ruled, in the state's favor, that Mr. Sochor's case decided those issues on the merits. *See Dougan v. State*, 17 Fla. L. Week. S10, S13, n. 3 (Fla. Jan. 2, 1992) ("Several issues have been decided adversely to Dougan's contentions: 1) adequacy of instructions on aggravating factors, *e.g., Sochor v. State*, 580 So.2d 595 (Fla.), *cert. granted*, 112 S.Ct. 436 (1991). . . . "), and *Henry v. State*, 586 So.2d 1033, 1038, n. 13 (Fla. 1991) (citing *Sochor* for the proposition that "[r]ejection of these [penalty phase jury] instructions has been upheld in other cases") *cert. filed* (Jan. 28, 1992). Further, the state supreme court ruled directly on the merits of Mr. Sochor's constitutional arguments respecting the constitutionality of the heinousness circumstance. JA 382. Thus the state's footnote arguments are completely insupportable.

B. On the merits, the state's argument is twofold. It asserts that the Florida court has consistently applied the "polestar" *State v. Dixon* definition, and that, since a Florida jury's sentencing verdict is advisory, the rule of *Maynard v. Cartwright*, 486 U.S. 352 (1988) does not apply.

i. *State v. Dixon* is less a "polestar" than a roving planet. The state disputes this by asserting that Mr. Sochor has misrepresented to this Court the state court's rulings in *Vaught v. State*, 410 So.2d 147 (Fla. 1982) and *Pope v. State*, 441 So.2d 1073 (Fla. 1984). State's brief, page

40, n. 30. This claim is easily refuted by looking at those two cases.

In *Vaught* the court wrote at page 151:[9]

> Appellant contends that the trial court erred in finding that the killing was especially heinous, atrocious, and cruel. He argues that since the shooting was spontaneous and caused nearly instantaneous death, it cannot come within the meaning of this aggravating circumstance, which, under the interpretations given by this Court, focuses on the infliction of physical pain or mental anguish. *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); *White v. State*, 403 So.2d 331 (Fla. 1981). In response the state correctly points out that the factor heinous, atrocious, or cruel has also been approved based on the fact that a killing was inflicted in a "cold and calculating" or "execution-style" fashion. *See, e.g., Magill v. State*, 386 So.2d 1188 (Fla. 1980), *cert. denied*, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981); *Alvord v. State*, 322 So.2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976); *Sullivan v. State*, 303 So.2d 632 (Fla. 1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

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[9] *Vaught* disposes of the state's suggestion at footnote 29 of its brief that the state stopped applying the heinousness circumstance to "execution-style" shootings after 1979. *See also, e.g., Harvard v. State*, 414 So.2d 1032 (Fla. 1982) (rejecting *State v. Dixon* argument), *cert. denied*, 459 U.S. 1017 (1983), and *Gaskin v. State*, 16 Fla. L. Week. S762 (Fla. Dec. 5, 1991). *Semble Walton v. State*, 547 So.2d 622 (Fla. 1989).

And in *Pope*, the court specifically disapproved of the *State v. Dixon* "conscienceless or pitiless crime which is unnecessarily torturous" construction approved in *Proffitt*:

> An especially heinous, atrocious or cruel homicide is one which is "accompanied by such additional acts as to set the crime apart from the norm of capital felonies." *State v. Dixon*, 283 So.2d at 9. This definition focuses on the manner in which the crime was accomplished – on the act itself – rather than on the perpetrator of the act. However, the definition continues, describing an especially heinous, atrocious or cruel crime as "the conscienceless or pitiless crime which is unnecessarily torturous of the victim." *Id.* While still focusing on the crime and experience of the victim, *this definition also tended to focus attention on the mindset of the murderer – his conscienceless or pitilessness.* This aspect of the aggravating factor was recognized in the jury instructions adopted by this Court in 1975.
>
> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain; *utter indifference to, or enjoyment of, the suffering of others; pitiless.*

Standard Jury Instructions in Criminal Cases, 78 (1975) (emphasis added). Because juries were invited to consider evidence tending to show a lack of pity, lack of remorse came to be considered relevant to the determination under this aggravating factor.

In 1981 the Supreme Court adopted a completely revised set of Standard Jury Instructions in Criminal Cases, "intended as a *definitive statement of the law* on which a trial jury is required to be instructed." *Notes on the Scope, Organization and Use of These Instructions*, Florida Standard Jury Instructions in Criminal Cases xxi (1981). The new jury instruction on finding a homicide to be especially heinous, atrocious or cruel now reads: "The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." No further definitions of the terms are offered *nor is the defendant's mindset ever at issue*. Thus, we find any consideration of defendant's remorse extraneous to the question of whether the murder of which he was convicted was especially heinous, atrocious or cruel.

441 So.2d at 1077-78 (emphasis added). Thus we see that cases focusing on the "manner in which the crime was accomplished," such as the case at bar, rely on the "accompanied by such additional acts as to set the crime apart from the norm of capital felonies" construction rather than the *Proffitt*-approved "conscienceless or pitiless" construction.

ii. As to the contention that Florida is a judge sentencing state, the state simply ignores its own agreement as to the primacy of the jury under *Tedder* and *Grossman*. Since the state does not contend (for it cannot) that the jury instruction was constitutional, and since the state does not claim (for it cannot) that the supreme court made any effort to cure the error, reversal is necessary under *Clemons* and *Shell v. Mississippi*, 111 S.Ct. 313 (1990). Insofar as the state asserts that the supreme court

found the evidence sufficient to support the circumstance, it is clear that the supreme court was using its highly deferential standard of review. Mere sufficiency of the evidence is not enough where the court does not have, or has not applied, an acceptable construction of the circumstance. *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard*.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DENNIS SOCHOR,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE OF THE STATE OF FLORIDA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Respondent.

On Writ of Certiorari to the Supreme Court of Florida

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INTEREST OF *AMICUS CURIAE*

Amicus obtained the consent of both parties to file this brief.

The Office of the Capital Collateral Representative of the State of Florida (CCR) was created by the Florida legislature, effective July 1, 1985. This state agency is charged with representing indigent prisoners sentenced to death who are unable to secure counsel in collateral challenges in both the state and federal courts after direct

appellate proceedings are concluded and the conviction and sentence have been affirmed. Fla. Stat. § 27.702 (1991) (CCR enabling statute). CCR presently represents 118 condemned prisoners.

As the state agency responsible for representing all indigent Florida prisoners under sentence of death, CCR has acquired experience and expertise that may assist the Court in appreciating the pivotal role of the sentencing jury in Florida's death penalty system.

SUMMARY OF ARGUMENT

The specific questions presented in this case involve Florida's application of its heinousness aggravating circumstance. In considering Florida's treatment of an aggravating circumstance, one must appreciate the central role of the jury in Florida's capital sentencing system. This brief addresses that role.

Florida's capital statute authorizes death as a possible punishment if a homicide is "especially heinous, atrocious or cruel." Fla. Stat. § 921.141(5)(h) (1991). Florida's heinousness aggravating circumstance is facially vague; some limiting construction is necessary to bring the circumstance within the ambit of constitutional acceptability. *Maynard v. Cartwright*, 486 U.S. 386 (1988). From this it follows that the *sentencer* must be informed of such limiting construction. The question then becomes: who is the actual capital sentencer in Florida?

In Florida the jury, not the trial judge or the Florida Supreme Court, is the only real capital sentencer. A jury's sentencing "recommendation" of life imprisonment or death carries great weight—the trial court and the Florida Supreme Court are all but bound by the jury's recommended sentence. *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975) (jury recommendations of life imprisonment may be overridden only where "no reasonable person could differ" that death is the appropriate punishment); *cf. Lewis v. Jeffers*, 110 S. Ct. 3092, 3103 (1990)

(state court's finding of an aggravating circumstance is unconstitutionally arbitrary and capricious "if no reasonable sentencer could have so concluded"). The requisite limiting construction of the heinousness aggravating factor thus must be provided to Florida sentencing juries in individual cases. Specifically, judicial involvement—by the trial court or the Florida Supreme Court—cannot cure a jury's tainted recommendation of death.

By exploring the role of the jury in Florida's three-stage capital sentencing system, this brief also speaks to the applicability—or inapplicability—of aspects of *Walton v. Arizona*, 110 S. Ct. 3047 (1990), and *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990), to Florida. *Walton* held that in those jurisdictions in which judges are the sole capital sentencers (excluding juries altogether from the death decision), no elaboration of the heinousness circumstance is required at the trial level; trial judges may be presumed to know the limiting gloss on the circumstance articulated by the appellate courts. *Clemons* permits appellate courts to cure jury error by independent judicial resentencing.

Neither of these aspects of *Walton* or *Clemons* applies to Florida. In Florida the jury is the only real sentencer for eighth amendment purposes. Under state law neither the trial court nor the Florida Supreme Court are permitted to act as independent resentencers.

ARGUMENT

BECAUSE THE WORDS OF FLORIDA'S "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE LACK ANY DIRECTIVE CONTENT, A LIMITING CONSTRUCTION OF THE CIRCUMSTANCE MUST BE COMMUNICATED TO THE PENALTY JURY—WHICH FOR EIGHTH AMENDMENT PURPOSES IS THE ONLY REAL CAPITAL SENTENCER IN FLORIDA

In states in which the jury weighs aggravating and mitigating circumstances and returns a verdict as to sentence, to pass constitutional muster an aggravating circumstance must adequately "inform juries what they must find [in order] to impose the death penalty." *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988). "When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." *Walton v. Arizona*, 110 S. Ct. 3047, 3057 (1990).

The disjunctive phrase "heinous, atrocious, or cruel" is vacuous and thus unconstitutionally vague, even when redundantly modified by the filler word "especially." *E.g.*, *Shell v. Mississippi*, 111 S. Ct. 313, 314 (1990); *Walton*, 110 S. Ct. at 3056-3058; *Maynard v. Cartwright*, 486 U.S. at 363-364; *see also Eddings v. Oklahoma*, 455 U.S. 104, 109 n.4 (1982); *Godfrey v. Georgia*, 446 U.S. 420, 431-433 (1980).

The unadorned statutory language of Florida's heinousness aggravating circumstance is "unconstitutionally vague on its face," *Walton*, 110 S. Ct. at 3057, because it does not channel the sentencer's discretion as required by the eighth amendment. The unanimous Court observed in *Cartwright*: "To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,'

whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" *Cartwright*, 486 U.S. at 363-64; *accord Shell v. Mississippi*, 111 S. Ct. 313 (1991) (Mississippi's "heinous, atrocious or cruel" aggravating circumstance unconstitutionally vague on its face).

From *Cartwright* it follows that the *sentencer* must be informed of the limiting construction of the heinousness factor that brings the facially vague aggravating circumstance within the orbit of constitutional acceptability. In distinguishing *Cartwright* from judge sentencing states such as Arizona, the Court in *Walton v. Arizona* noted that in jury sentencing jurisdictions "the jurors [must] be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." *Walton*, 110 S. Ct. at 3057.

This case therefore presents the question: Who *is* the real capital sentencer in Florida? Is it the jury, which by majority vote renders a "recommendation" of sentence that may be overridden only if no reasonable jury could have reached that sentencing decision? Is it the trial court, which must follow the sentencing jury's recommendation of death or life imprisonment unless no reasonable jury could have done what that jury did? *See Cheshire v. State*, 568 So.2d 908, 911 (Fla. 1990) (trial court's sentencing "role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending a life sentence"). Or is it the Florida Supreme Court, which reviews death sentences for error and proportionality, which in the past half decade has reversed almost 90 percent of those death cases in which the judge overrode the jury's life recommendation, and which has repeatedly said that it does not reweigh aggravating and mitigating circumstances as part of its appellate review

function—in other words, it does not resentence? *See Hudson v. State*, 538 So.2d 829, 831 (Fla. 1989) ("it is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstance").

This Court held in *Clemons v. Mississippi*, 110 S. Ct. 1441, 1446 (1990), that it was permissible, although not required, for a state appellate court, upon the striking of improper aggravating circumstances, to reweigh the remaining aggravating circumstances against the mitigation. The sixth amendment is not violated "where an appellate court invalidates one of two or more aggravating circumstances found by the jury but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence." *Id.*

Such reweighing is proper only if allowed by the state's own law. Each state must "decide for itself whether the death sentence was to be affirmed even though one of the two aggravating circumstances on which the jury had relied should not have been or was improperly presented to the jury." *Id.* at 1447.[1] Mississippi had not decided. The *Clemons* Court vacated the judgment and remanded the case to the state courts, because it was "unclear whether the Mississippi Supreme Court correctly employed" this method. *Id.*

Unlike Mississippi in *Clemons*, Florida has decided its appellate role in capital cases. In deciding who dies in Florida, the jury proceeding is the main event. The *Clemons* analysis may be triggered in either of two places

[1] The *Clemons* Court also held that an appellate court may engage in harmless error analysis. The harmless error aspect of *Clemons* is beyond the scope of this brief.

In any event, the harmless error analysis of *Clemons* has no apparent applicability to Mr. Sochor's case. Because the Florida Supreme Court found no error here, it can hardly be asserted that the court found error harmless; it certainly cannot be maintained that the Florida court articulated any harmlessness finding sufficient to satisfy the requirements of *Clemons*.

in Florida's trifurcated capital sentencing structure: at the trial judge sentence imposition stage, or at the Florida Supreme Court review stage. However, the following subsections will show that the Florida courts have not assumed the role of independent reweigher. In fact, notwithstanding statutory and case law language to the contrary, in Florida the jury is the only real capital sentencer.

Appreciation of the Florida sentencing jury's importance also shows why *Walton v. Arizona* does not apply to Florida. *Walton* held that "the logic [of *Cartwright* and *Godfrey*] has no place in the context of sentencing by a trial judge. Trial judges are presumed[2] to know the law and to apply it in making their decisions." *Walton*, 110 S. Ct. at 3057. Conversely, the logic of *Walton* has no place in the context of sentencing by a jury. Moreover, in those jurisdictions where the judge is the exclusive sentencer, "even if a trial judge fails to apply the narrowing construction" of a vague aggravating circumstance, a state appellate court "may itself determine whether the evidence supports the existence of the ag-

[2] The general presumption mentioned in *Walton* collides in Florida with the presumption that judges follow the jury instructions they give. The Florida Supreme Court has held that if the record does not reflect an affirmative statement to the contrary, "it may be presumed that the judge's perception of the law coincided with the manner in which the jury was instructed." *Ziegler v. Dugger*, 524 So.2d 901, 902 (Fla. 1987), *cert. denied*, 487 U.S. 1240 (1988); *accord Morgan v. State*, 519 So.2d 975, 976 (Fla.), *cert. denied*, 486 U.S. 1036 (1987); *Foster v. State*, 518 So.2d 901, 902 (Fla. 1987), *cert. denied*, 487 U.S. 1240 (1988); *Johnson v. Dugger*, 520 So.2d 565, 566 (Fla. 1988); *Daugherty v. Dugger*, 839 F.2d 1426, 1432 (11th Cir.), *cert. denied*, 488 U.S. 871 (1988); *cf. Parker v. Dugger*, 111 S. Ct. 731 (1991) (where jury was instructed as to nonstatutory mitigating factors in accordance with *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Court concluded that the trial judge found nonstatutory mitigating circumstances: "We assume that the judge applied the same standard himself" as he had instructed the jury). Thus, jury instructions that are insufficient under *Cartwright* are significant in the absence of affirmative evidence that the trial court applied a sufficiently narrow construction of the heinousness factor.

gravating circumstance as properly defined," or the court "may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty." *Id.* (citing *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990)).

Language in *Walton* also suggests an interpretation of *Clemons* which makes sense in judge sentencing states and in jury sentencing states where juries are required to articulate the basis of their sentencing decisions, but which makes no sense in Florida. Citing *Clemons*, the Court in *Walton* said that "a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty." *Walton*, 110 S. Ct. at 3057.

The Florida Supreme Court has used a similar methodology to deny *Cartwright*'s relevance in Florida.[3] But the Florida Supreme Court ignores *Walton*'s unstated as-

[3] The Florida Supreme Court attempts to distinguish Florida's statutory scheme from that of Oklahoma—the jurisdiction at issue in *Maynard v. Cartwright*—by asserting that the heinousness aggravating circumstance has been judicially limited in Florida, and, since Florida judges impose sentence, the appellate court can determine whether its limiting construction has been followed. *See Smalley v. State*, 546 So.2d 720 (Fla. 1989). Although Smalley had not preserved his challenge to the jury instruction issue, the court has since relied on that case to reject summarily constitutional challenges to the aggravating circumstance's instructions. *E.g., Robinson v. State*, 16 Fla. L. Week. S107, S110 n.6 (Fla. 1991); *Porter v. Dugger*, 559 So.2d 210, 213 (Fla. 1990) ("*Maynard* does not affect Florida's death sentencing procedures"); *Brown v. State*, 565 So.2d 304, 308 (Fla. 1990) ("We have previously found *Maynard* inapposite to Florida's death penalty sentencing"); *Occhicone v. State*, 570 So.2d 902, 906 (Fla. 1990) ("*Maynard* did not make Florida's penalty instructions on . . . heinous, atrocious, or cruel unconstitutionally vague"); *Mills v. Dugger*, 574 So.2d 63, 65 (Fla. 1990) (*Maynard* is "inapplicable to Florida"). *But see In re Standard Jury Instructions, Criminal Cases, No. 90-1*, 579 So.2d 75 (Fla. 1991) (modification of jury instructions in apparent attempt to comply with *Maynard*).

sumption here: that the trial-level sentencer *did* in fact find the existence of the aggravating circumstance at issue. That assumption holds in judge sentencing states like Arizona, since, as *Walton* itself demonstrates, sentencing judges identify the basis of their decisions. The assumption also holds in most jury sentencing states, which require the jury to articulate the aggravating and mitigating factors it has found to apply in individual cases.

Walton's assumption does not hold in Florida's system of divided sentencing responsibility at the trial level: For while the judge must delineate the aggravating and mitigating circumstances he finds to support a sentence of death, the jury's antecedent recommendation of sentence makes no such specification. Like a jury's general verdict of guilt or innocence, the jury's recommended sentence is an opaque statement that the jury's verdict was life or death. Period. Such an enigmatic verdict by the jury—which is the real capital sentencer in Florida—provides none of the appellate reliability that formed the underpinning of *Walton*.

Florida's system of capital sentencing provides *less* room for retrospective appellate review than that permitted by the purely jury sentencing states (such as Mississippi in *Clemons*) and the purely judge sentencing states (such as Arizona in *Walton*). The basis of a death sentence in Florida is a stew that defies retrospective reconstruction, because one simply does not know what the actual foundation of the jury's sentencing recommendation in fact was. One can speculate about what it might have been, given the evidence, as the trial judge and Florida Supreme Court are forced to speculate. But such speculation was not the rational appellate review process contemplated in *Walton*.

Mr. Sochor's case illustrates the point. Perhaps his jury did not even find the heinousness factor to be present. Perhaps the jury found the circumstance present, but the jury did so only due to a misunderstanding about the constitutionally permissible breadth of the factor. Perhaps the jury found the circumstance present but

gave it little weight. Perhaps heinousness was the only aggravating circumstance given much weight by the jury. Perhaps the overbreadth of the heinousness factor tipped the jury's sentencing balance in favor of death. Perhaps the trial judge based his death sentence on a reasonable—but factually wrong—belief that the jury's death recommendation was predicated on a finding that the heinousness factor was present in the case.[4]

All the Florida Supreme Court knows is that the jury may have found the heinousness factor present and that the trial judge did find it present. The appellate court cannot know whether the jury *did* in fact find the factor present.[5] The Florida Supreme Court's review merely

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[4] The impossibility of divining what aggravating and mitigating circumstances the jury actually finds, as well as the mysteries of the process of guessing what the jury actually did with whatever aggravating and mitigating circumstances the jury actually found, are suggested by *Rogers v. State*, 511 So.2d 526, 534 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988). *Rogers* was concerned with the proper consideration of mitigation, but the case's lessons apply equally to the aggravation side of the sentencing equation. In analyzing mitigating evidence, the

> trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, *i.e.*, factors that, in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Id. The reasoning process demanded by *Rogers* cannot be reconstructed retrospectively from a jury's bare verdict of death or life imprisonment.

[5] Further, the Florida Supreme Court has not in fact placed a sufficient narrowing gloss on the heinousness factor. Though it once may have appeared that the Florida courts had adopted such a construction, *see Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976); *Proffitt v. Wainwright*, 688 F.2d 1227, 1263 (11th Cir. 1983), in fact the circumstances has become a universal catch-all. "It is difficult to imagine a murder to which the circumstances could not be applied by citing some case. . . ." Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?*, 15 Stetson L. Rev. 263, 318 (1986). Full discussion of the matter is beyond the scope of this brief, but *see generally* Rosen, *The "Especially Heinous" Aggravating Circumstance: The Standardless Standard*, 64 N.C.L. Rev. 941, 972-75 (1986); Skene, *supra*, at 317-321; Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97, 127-28 (1979); Mello, *Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller*, 13 Stetson L. Rev. 523 (1984). Commentors universally criticize heinousness aggravating circumstances as vague, overbroad, and meaningless. *E.g.*, Rosen, *supra*, at 944 (collecting examples).

ascertains whether it would have been an abuse of discretion for the jury to have found the factor—*if* the jury had found it in the first place.

The inquiry under *Walton*, as under *Clemons*, turns ultimately on what the jury's sentencing function is in Florida's death sentencing process. The remainder of this brief will demonstrate that for eighth amendment purposes, Florida should be treated as a jury sentencing jurisdiction, because the jury is the only real capital sentencer in Florida.

A. Who Really Decides Who Dies in Florida: The Jury's Sentencing "Recommendation" and the Trial Court's Sentencing "Imposition"

Florida's capital statute provides: "Notwithstanding the recommendation of a majority [6] of the jury, the court, after weighing the aggravating and mitigating circum-

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[6] Although Florida's capital statute speaks in terms of a recommendation by a "majority" of the jury, Fla. Stat. § 921.141(2) (1991), a split vote of 6-6 is treated as a recommendation of life imprisonment. *Patten v. State*, 467 So.2d 976, 980 (Fla. 1985); *Rose v. State*, 425 So.2d 521, 525 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983). A 1980 survey found that 23 states explicitly required jury unanimity to impose death, and that most of the remaining capital punishment states with jury sentencing did so by implication. Gillers, *Deciding Who Does*, 129 U. Pa. L. Rev. 1, 102-19 (1980).

stances," enters a sentence of life imprisonment or death. Fla. Stat. § 921.141(3) (1991). Unlike judge sentencing states such as Arizona [7]—and even unlike Alabama and

[7] In Arizona, Idaho, Montana, and Nebraska, the court alone imposes sentence. Ariz. Rev. Stat. Ann. § 13-703 (1990); Idaho Code § 19-2515 (1987); Mont. Code Ann. § 46-18-301 (1990); Neb. Rev. Stat. § 29-2520 (1985). At least 27 jurisdictions with presumptively valid capital statutes allow a death sentence only if the jury votes for death, unless the defendant has requested sentencing by the court. 49 U.S.C. § 1473(c) (1988); Ark. Stat. Ann. § 5-4-603 (Supp. 1989); Cal. Penal Code § 190.3 (West 1988); Colo. Rev. Stat. § 16-11-103 (1986 & Supp. 1991); Conn. Gen. Stat. §§ 53a-56a (1985); Ga. Code Ann. §§ 17-10-30 to 17-10-32 (1991); Ill. Rev. Stat. ch. 38, ¶ 9-1 (1979 & Supp. 1991); Ky. Rev. Stat. Ann. § 432.025 (Michie/Bobbs-Merrill 1991); La. Code Crim. Proc. Ann. art. 905.8 (West 1984 & Supp. 1991); Md. Ann. Code art. 27, § 413 (1987 & Supp. 1991); N.H. Rev. Stat. Ann. § 630.5 (1986 & Supp. 1991); N.J. Stat. Ann. § 2C:11-3 (West 1982 & Supp. 1991); N.M. Stat. Ann. § 31-20A-3 (1991); N.C. Gen. Stat. § 15A-2000 (1983); Ohio Rev. Code Ann. § 2929.03 (Baldwin 1987); Okla. Stat. Ann. tit. 21, § 701.11 (West 1983 & Supp. 1991); 42 Pa. Cons. Stat. Ann. § 9711(f) (Purdon 1982); S.C. Code Ann. § 16-3-20 (Law. Co-op. 1985 & Supp. 1991); S.D. Codified Laws Ann. § A-27A-4 (1988); Tenn. Code Ann. § 39-13-204 (Supp. 1991); Tex. Crim. Proc. Code Ann. § 37.071 (Vernon 1981 & Supp. 1991); Utah Code Ann. § 76-3-207 (Supp. 1991); Va. Code Ann. § 19.2-264.4 (1991); Wash. Rev. Code Ann. § 10.95.030 (1991); Wyo. Stat. § 6-2-102 (1988). In Nevada the jury is given responsibility for imposing the sentence in capital cases; if the jury cannot agree, a panel of three judges may impose sentence. Nev. Rev. Stat. Ann. §§ 175.554, 175.556 (Michie 1986).

Only in Florida, Alabama, Indiana, and (as of November 4, 1991) Delaware, are jury sentencing verdicts of life imprisonment subject to override. Ala. Code § 13A-5-46 (1982); Fla. Stat. § 921.141(3) (1991); Ind. Code § 35-50-2-9 (1985 & Supp. 1991).

In November 1991, Delaware, reportedly reacting emotionally to a highly publicized case, removed the sentencing authority of capital juries and placed it in the hands of sentencing judges. The juries' function under the revised statute is to make findings regarding the existence of aggravating circumstances and to state whether the aggravating factors outweigh those in mitigation. The revisions to the statute reportedly were precipitated by the "failure" of a capital jury to return death sentences against four defendants in

Indiana, the other two longstanding jury override states (where the jury's recommended sentence really is not more than an advisory opinion of marginal importance) [8]—in

an armed-robbery case in which two armored car guards were shot and killed. Caddell, *Lawmakers React Emotionally: Vile Crimes Trigger Vengeful Action in Legislature*, [Del.] Sunday News Journal, Nov. 10, 1991, at A12, col. 2 ("In the Brooks case last month, the jury's inability to reach a unanimous decision on the death penalty resulted in the Legislature passing a new law, which takes the final decision away from the jury and gives it to the trial judge"). The revisions were adopted by the Delaware General Assembly in one day the same week the penalty verdicts were returned in that robbery case, with almost no reflection and little debate by legislators except expressions of "outrage" and "disgust" at the sentencing outcome in that case. The legislation incorporating the revisions was Senate Substitute 1 for Senate Bill 79. *See* Appendix C. The governor approved the revisions on November 4, 1991. All Delaware capital trials have been stayed pending resolution by the Delaware Supreme Court of ten certified questions relating to revisions of the death penalty statute, certified to that court by the Superior Court trial judge in *State v. Cohen*, —— A.2d ——, Nos. IN-90-02-0474 through IN-90-02-0477 (Del. Super. Nov. 6, 1991). *See* Appendix C.

[8] Ala. Code § 13A-5-47(c) ("While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court"); Ind. Code § 35-20-2-9(c) ("The court is not bound by the jury's recommendation"); *Floyd v. State*, 486 So.2d 1309, 1316 (Ala. Crim. App. 1985), *aff'd sub nom. Ex Parte Floyd*, 486 So.2d 1321, 1323 (Ala. 1986); *Schiro v. State*, 451 N.E. 2d 1047, 1053 (Ind.), *cert. denied*, 464 U.S. 1003 (1983). In neither Alabama nor Indiana does the appellate court review the trial court's jury override sentencing in light of the jury's recommendation. The focus of appellate review in those states is on the propriety of the trial judge's decision, with the jury's recommendation viewed, at best, as a factor to be "considered."

Some Alabama and Indiana cases have rejected the jury recommendation of sentence as an especially significant factor in appellate review. *E.g.*, *Ex Parte Jones*, 456 So.2d 380, 382 (Ala. 1984) ("It appears to this Court, however, that the United States Supreme Court . . . [did not find Florida's rule requiring great deference to jury recommendations of life imprisonment] to be a general constitutional requirement under a statutory scheme similar to that of Florida"); *Schiro*, 451 N.E.2d at 1058 ("While we agree that a jury plays a very important and necessary role in our ju-

Florida the jury's recommendation of life or death carries great weight.

The Florida sentencing jury's role is central to the decision to impose life imprisonment or death. Jury recommendations of life imprisonment may be overridden by the judge only in those rare instances where "virtually no reasonable person could differ" that death should be imposed in the case. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975); *see also Cochran v. State*, 547 So. 2d 928, 933 (Fla. 1989). This Court in *Proffitt v. Florida*, 428 U.S. 242, 249 (1976), relied upon and quoted from *Tedder* in upholding the abstract constitutionality of Florida's capital statute as a whole, incidently including the jury override. The Court also acknowledged the *Tedder* standard in *Spaziano v. Florida*, 468 U.S. 447 (1984), in specifically upholding the facial constitutionality of the override itself.[9] Most re-

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dicial system, we are loath to institute a higher degree of scrutiny in situations where the trial court and jury disagree about the imposition of the death penalty"). *See also Baldwin v. Alabama*, 472 U.S. 372 (1985). Under Alabama law, the sentencing judge must consider the jury's sentencing recommendation but is free to override it subject to an abuse of discretion standard of review. In *Ex Parte Clisby*, the Alabama Supreme Court stated: "It is sufficient that the trial court, which is in no way bound by the jury's recommendation concerning sentencing, is required to, and in this case did, make written findings." 456 So.2d 105, 109 (Ala. 1984), *cert. denied*, 470 U.S. 1009 (1985). This approach was followed in *Edwards v. State*, 515 So.2d 86, 89 (Ala. Crim. App. 1987), where the court noted that "the trial judge is, therefore, free to consider such cases on an individual basis in order to determine whether the aggravating circumstances outweigh the mitigating circumstances and vice versa." The court in *Lindsey v. State*, 456 So.2d 383, 390 (Ala. Crim. App. 1983), held that the trial judge was free to disregard a jury's recommendation. *See also, e.g.; Ex parte Hayes*, 518 So.2d 768 (Ala. 1986); *Tarver v. State*, 500 So.2d 1232 (Ala. Crim. App. 1986), *aff'd*, 500 So.2d 1256 (Ala. 1986).

Delaware's 1991 override statute has not yet generated any interpretive case law.

[9] A year after *Spaziano* was decided, the Court held in *Caldwell v. Mississippi*, 472 U.S. 310 (1985), that capital sentencers may not be misled about the importance of their decisions. Florida's capital

cently in *Parker v. Dugger*, in invalidating the override as applied, the Court reaffirmed its consistent and accurate understanding that "under Florida law, a sentencing judge is to override a jury's recommendation of life imprisonment only when 'virtually no reasonable person could differ.'" *Parker v. Dugger*, 111 S. Ct. 731, 735 (1991) (quoting *Tedder v. State*); *id.* at 735 (again citing *Tedder* for same proposition); *id.* at 737 (same). "We have held specifically that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error, and have noted the 'crucial protection' afforded by such review in jury override cases." *Parker*, 111 S. Ct. at 739 (quoting *Dobbert v. Florida*, 432 U.S. 282, 295 (1977) and citing *Proffit v. Florida*, 428 U.S. 242, 253 (1976) and *Spaziano v. Florida*, 468 U.S. 447, 465 (1984)). *Cf. Lewis v. Jeffers*, 110 S. Ct. 3092, 3103 (1990) (state court's finding of an aggravating circumstance is arbitrary and capricious if "no reasonable sentencer could have so concluded").

"That the [Florida Supreme Court] meant what it said in *Tedder* is amply demonstrated by the dozens of cases in which it has applied the *Tedder* standard to reverse a trial judge's attempt to override a jury recommendation of life." *Mann v. Dugger*, 844 F.2d 1446, 1451 (11th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1071 (1989). The following table shows that over the decade-and-a-half life-

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jury instructions as applied may well fall afoul of *Caldwell*. *See Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1071 (1989); *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), *modified sub nom. on other grounds, Adams v. Dugger*, 816 F.2d 1493 (11th Cir. 1987), *rev'd on other grounds*, 489 U.S. 401 (1989); *compare Harich v. Dugger*, 844 F.2d 1464 (11th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1000 (1989); *see also* Mello, *Taking* Caldwell v. Mississippi *Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C.L. Rev. 283 (1989); Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. Rev. L. & Social Change 887, 908-910 (1990-1991).

span of Florida's 1972 capital statute, life "recommendation" override cases have been reversed in seventy-five percent of the cases, reversals usually based entirely on the override issue itself.[10]

Year	Direct Appeal Decisions in Life Recommendation Cases	Number Reversed	Percentage
1991	11	10	91%
1990	5	5	100%
1989	6	5	83%
1988	10	9	90%
1987	6	5	83%
1986	8	7	87%
1985	7	3	43%
1984	11	4	36%
1983	12	9	75%
1982	9	6	66%
1981	16	11	67%
1980	4	4	100%
1979	3	2	66%
1978	3	2	66%
1977	4	3	75%
1976	6	5	83%
1975	5	3	60%
1974	1	1	100%
TOTAL	127	94	75%

See Appendix A (providing citation support for Table 1).

These figures become even more significant when sorted into three time frames. From 1974 (when the first override cases reached the Florida Supreme Court) through December 1983, only seventeen of sixty-three life overrides

[10] The vast majority of these cases were reversed, and life sentences mandated, pursuant to application of *Tedder*. *See* Appendix A. This listing includes some override cases where the condemned appellant prevailed on grounds other than the override itself. *See* Appendix A. These cases ought to be included in the tabulation, because "the strongest predictor of a favorable Florida Supreme Court decision [to the death row inmate] is a jury recommendation of life imprisonment rather than death." Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. Crim. L. & Criminology 913, 923 (1983). *See* discussion *infra*, § B.

were affirmed (28%); forty-five were reversed (72%). In 1984 and 1985, affirmances by the Florida Supreme Court became significantly more frequent: eleven of eighteen (61%); only seven were reversed (39%). But from 1986 through December 1991, only five of forty-six (11.1%) were affirmed; forty-one were reversed (89.9%).

Over the past half decade, in other words, cases with jury life recommendation overrides were reversed almost ninety percent of the time. Judge overrides of life recommendations survived appellate review in a paltry 11.1 percent of the cases.[11]

[11] The cases decided during the past two years show the robustness of *Tedder*. In 1990, the Florida Supreme Court granted relief in all five jury override cases it decided on appeal. *See Morris v. State*, 557 So.2d 27 (Fla. 1990) (trial court found one aggravating circumstance and no mitigating factors; override reversed; life sentence mandated); *Hallman v. State*, 560 So.2d 223 (Fla. 1990) (trial court found six aggravating and no mitigating circumstances; override reversed; life sentence mandated); *Carter v. State*, 560 So.2d 1166 (Fla. 1990) (trial court found five aggravating and no mitigating circumstances; override reversed; life sentence mandated); *Cheshire v. State*, 568 So.2d 908 (Fla. 1990) (trial court found three aggravating and no mitigating circumstances; override reversed; life sentence mandated); *Buford v. State*, 570 So.2d 923 (Fla. 1990) (trial court found two aggravating factors and one mitigating circumstance; override reversed; life sentence mandated).

In 1991, the court granted relief in ten of the eleven jury override cases it considered on direct appeal. *See Dolinski v. State*, 576 So.2d 271 (Fla. 1991) (trial court found three aggravating and no mitigating circumstances; override reversed; life sentence mandated); *Douglas v. State*, 575 So.2d 165 (Fla. 1991) (trial court found two aggravating and two mitigating circumstances; override reversed; life sentence mandate); *Hegwood v. State*, 575 So.2d 170 (Fla. 1991) (trial court found six aggravating factors and one mitigating circumstance; override reversed; life sentence mandated); *Downs v. State*, 574 So.2d 1095 (Fla. 1991) (trial court found four aggravating and no mitigating factors; override reversed, life sentence mandated); *McCrae v. State*, 582 So.2d 613 (Fla. 1991) (trial court found four aggravating and no mitigating circumstances; override reversed; life sentence mandated); *Cooper v. State*, 581 So.2d 49 (Fla. 1991) (trial court found four aggravating and two mitigating

The Florida Supreme Court recognizes that the *Tedder* standard is rigorous. Citing figures of reversals based solely on the override issue itself, the court in *Cochran v. State*, 547 So. 2d 928, 933 (Fla. 1990), reiterated its earlier statements that "[d]uring 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent." By contrast, "during 1986 and 1987 we have affirmed overrides in only two of eleven cases, less than twenty percent." *Id.* (citing *Grossman v. State*, 525 So.2d 833, 851 (Fla. 1988) (Shaw, J., specially concurring)). "This current reversal rate of over eighty percent is a *strong indicator to [trial] judges that they should place less reliance on their independent weighing of aggravation and mitigation.*" *Id.* (emphasis added).[12]

Tedder applies regardless of whether the jury recommends death or life imprisonment. Like a jury recommendation of life, "a jury recommendation of death should be given great weight." *Grossman v. State*, 525 So.2d 833,

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circumstances; override reversed; life sentence mandated); *Bedford v. State*, 16 Fla. L. Week. S665, 1991 WL 201666 (Fla. Oct. 10, 1991) (trial court found three aggravating and no mitigating circumstances; override reversed; life sentence mandated); *Craig v. State*, 585 So.2d 278 (Fla. 1991) (trial court found two aggravating and no mitigating circumstances; override reversed, life sentence mandated); *Savage v. State*, 16 Fla. L. Week. S.647 (Fla. 1991) (decision does not reflect what trial court found; override reversed; life sentence mandated); *Wright v. State*, 586 So.2d 1024 (Fla. 1991) (trial court found four aggravating and four mitigating factors; override reversed; life sentence mandated); *Ziegler v. State*, 580 So.2d 127 (Fla. 1991) (defendant murdered a series of people as part of a carefully premediated plan to obtain insurance proceeds; trial court found four aggravating and one mitigating circumstance; override affirmed).

[12] *See also* Radelet, *Rejecting the Jury*, 18 U.C.D.L. Rev. 1409, 1412 (1985); Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. Crim. L. & Criminology 913, 923 (1983); Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 Fla. St. U. L. Rev. 923 (1991).

840n.1 (Fla. 1988).[13] For example, the Florida Supreme Court applied the *Tedder* standard to a death recommendation in *LeDuc v. State*, 365 So.2d 149 (Fla. 1978). LeDuc had pleaded guilty to a murder, and the prosecutor, carrying out a plea bargain, argued for a life sentence (after briefly listing the applicable aggravating circumstances and noting that no evidence of mitigation had been introduced). The jury was unanimous in recommending death; the supreme court, citing *Tedder*, said the recommendation of a jury "should not be disturbed . . . unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation." *Id.* at 151. The same indirect application of *Tedder* happened in *Stone v. State*, 378 So.2d 765 (Fla. 1979), when the court performed proportionality review and compared Stone's case with *Swan v. State*, 322 So.2d 485 (Fla. 1975). "Swan's jury recommended mercy while Stone's recommended death, and the jury recommendation is entitled to great weight," the court declared. *Stone*, 278 So.2d at 772. Thus, the death sentence in *Swan* was reversed; in *Stone* it was affirmed. *Tedder* explains the difference.

The importance of the sentencing jury's death recommendation is underscored by the behavior of the Florida Supreme Court when it finds error in jury proceedings that result in death recommendations. As the Eleventh Circuit en banc court observed:

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[13] Justice England, who wrote *Tedder*, suggested later in a concurrence that the jurisprudential basis of the *Tedder* rule applied to death as well as life recommendations. "[T]he judge's role is primarily to insure the jury's adherence to law and to protect against a sentence resulting from passion rather than reason," he wrote in *Chambers. v State*, 339 So.2d 204, 208 (Fla. 1976) (England, J., concurring). "Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given an opportunity to evaluate, the jury recommendation should be followed . . . ." *Id.*

> [T]he [Florida Supreme Court] will vacate the [death] sentence and order resentencing before a new jury if it concludes that the proceedings before the original jury were tainted by error. Thus, the supreme court has vacated death sentences where the jury was presented with improper evidence, or was subject to improper argument by the prosecutor. The supreme court has also vacated death sentences where the trial court gave the jury erroneous instructions on mitigating circumstances or improperly limited the defendant in his presentation of evidence of mitigating circumstances. In these cases, the supreme court frequently focuses on how the error may have affected the jury's recommendation . . . . Finally, we note that the Supreme Court of Florida has ordered resentencing in cases where the trial court excused a prospective juror in violation of *Witherspoon v. Illinois*.

Mann v. Dugger, 844 F.2d at 1452-53 (footnote and citations omitted).

After this Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Florida Supreme Court reaffirmed the importance of the sentencing jury's verdict in Florida's trifurcated capital sentencing system. In the wake of *Hitchcock*, the Florida Supreme Court said that "if the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, the entire sentencing process necessarily is tainted by the procedure." *Riley v. Wainwright*, 517 So.2d 656, 659 (Fla. 1987); *accord Hall v. State*, 541 So.2d 1125, 1128 (Fla. 1989) (It "is of no significance that the trial judge stated that he would have imposed the death penalty in any event [absent error in jury proceeding]. The proper standard is whether a jury recommending life imprisonment would have had a reasonable basis for that recommendation").[14]

[14] *See also Waterhouse v. State*, 522 So.2d, 348, 354 (Fla. 1988); *Cooper v. Dugger*, 526 So.2d 900 (Fla. 1988); *Foster v. State*, 518 So.2d 901 (Fla. 1987), *cert. denied*, 487 U.S. 1240 (1988); *Mikenas v. Dugger*, 519 So.2d 601 (Fla. 1988); *Zeigler v. Dugger*, 524 So.2d 419 (Fla. 1988); *Morgan v. State*, 515 So.2d 975 (Fla. 1987), *cert. denied*, 486 U.S. 1036 (1988); *Jones v. Dugger*, 867 F.2d 1277, 1280 (11th Cir. 1989); *Magill v. Dugger*, 824 F.2d 879, 893 (11th Cir. 1987).

That judge resentencing cannot cure jury error is illustrated by *Mikenas v. Dugger*, 519 So.2d 601 (Fla. 1988). Mikenas' jury recommended death, and the court imposed death. The Florida Supreme Court ordered a judge-only resentencing, because the trial court improperly considered non-statutory aggravating circumstances. Following the reimposed death sentence, the Florida Supreme Court found that the sentence violated *Hitchcock v. Dugger*, and that such jury error required a new jury sentencing proceeding.

Tedder not only "lives," as one writer put it, *see* Barnard, *Death Penalty*, 13 Nova L. Rev. 908, 970 (1989); in Florida *Tedder* thrives. Four months ago, the Florida Supreme Court held that double jeopardy barred again subjecting a defendant to a death sentence, when the jury in the initial trial recommended life imprisonment. *Wright v. State*, 586 So.2d 1024 (Fla. 1991). Citing the state constitution's prohibition against double jeopardy, the court explained that "when it is determined on appeal that the trial court should have accepted a jury's recommendation of life imprisonment pursuant to *Tedder*, the defendant must be deemed acquitted of the death penalty for double jeopardy purposes." *Id.* at 1032.

The Supreme Court of Florida thus acknowledges that a jury recommendation of death or life imprisonment has a "*sui generis* impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside trial level sentencing error." *Mann*, 844 F.2d at 1453. It is not surprising that the Florida Supreme Court would make this kind of normative judgment. "A jury recommendation is, after all, the final stage in an elaborate process whereby the community expresses its judgment regarding the appropriateness of a death sentence." *Id.* at 1454. The process "be-

gins with the legislature, which broadly defines the class of cases for which capital punishment is appropriate. Then, in the particular case, the prosecutor—who is electorally accountable to the community—makes the decision whether to request the death penalty. Finally, the jury, traditionally depicted as the conscience of the community, makes a judgment about the appropriateness of death in light of aggravating and mitigating circumstances. Thus, by the time the case comes before the judge for the actual imposition of sentence, it has already been filtered through three levels of community sentiment, each level less porous than the preceding one." *Id.*

B. Florida Supreme Court Review

"Just what *does* the [Florida Supreme Court] do when it reviews a [capital] case?" Skene, *supra*, at 291 (emphasis in original). The answer is somethting of a "mystery," *id.*, but two things are fairly free of doubt. First, the scope of the Florida Supreme Court's review, like the discretion of the trial court to impose sentence, is cabined by the jury's recommended sentence. Second, this deference to the jury is unsurprising notwithstanding the misleading characterization of its verdict as a "recommendation," because the Florida Supreme Court simply "reviews" death sentences for error and proportionality. The appellate court does not itself resentence, since it does not reweigh the evidence of aggravating and mitigating circumstances.

The importance of the jury's sentencing recommendation does not end with the trial judge; it carries over into the Florida Supreme Court's review of capital cases. Students of the Florida Supreme Court's death penalty jurisprudence have documented that the jury recommendation is the single best predictor of direct appeal outcomes. Here, as at the trial level, the jury's sentencing verdict is the main event.

George Dix, examining the Florida Supreme Court's disposition of its first 66 homicide cases involving death

sentences, concluded in 1979 that "the relation between the advisory jury and the sentencing judge is crucial to an understanding of the Florida appellate process." Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97, 124 (1979). Although "the Florida Supreme Court has been far more willing to reduce death penalties than its Georgia counterpart," this willingness "reflects a requirement of extraordinary justification for a trial judge to override a jury's advisory verdict favoring leniency. In only one case has the court reduced a death penalty when both the trial judge and jury agreed that death was the most appropriate penalty, and in that case the decision of the trial court rested in large part upon an improper perception of the aggravating nature of one of the defendant's actions." *Id.* at 141. Professor Dix's graphic illustration of the point is reproduced at Appendix B of this brief.

Similarly, Michael Radelet and Margaret Vandiver studied all reported Florida Supreme Court decisions in death penalty cases during the period from January 1, 1973 to December 31, 1981, and concluded that "the strongest predictor of a favorable Florida Supreme Court decision [to the prisoner] is a jury recommendation of life imprisonment rather than death." Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. Crim. L. & Criminology 913, 923 (1983); *id.* at 919-920; *see also* Skene, *supra*, at 198 ("The jury recommendation appears to determine the degree of deference the supreme court gives to trial judges' findings on aggravating and mitigating circumstances").[15]

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[15] Skene elaborated: "If the jury recommended death, the supreme court usually . . . defers to the trial judge's findings. If the jury recommended life, however, the court becomes more willing to second-guess the judge's findings; for the most part, trial judges' findings that mitigating circumstances exist or are of little weight are aggressively reviewed." Skene, *supra*, at 298. Skene's analysis is illustrated by *Hallman v. State*, 560 So.2d 223, 227 (Fla. 1990), where the court reversed an override of a jury's life recommendation because the jury could reasonably have concluded that the aggravating factors found by the trial judge were "entitled to little weight."

C. The Roots of *Tedder v. State*: The Tradition of Jury Capital Sentencing in Florida, and the Limited Appellate Review Function of the Florida Supreme Court

The pervasive influence of the jury's sentencing "recommendation" shows that the *Tedder* standard is no technicality. *Tedder* draws from a century-old tradition of jury capital sentencing in Florida. The override was enacted in a reasonable attempt to comply with the commands of *Furman v. Georgia*, 408 U.S. 238 (1972).[16] For the century before *Furman*—1872 to 1972—a Florida jury's verdict for mercy was final. By 1884 the Florida Supreme Court was able to state that "the law is positive. If a majority of the jurors recommend to mercy, by whatever motives they may be activated (and those motives are not circumscribed), the court is bound to heed their verdicts and pronounce sentence accordingly." *Newton v. State*, 21 Fla. 53, 101 (1884).[17]

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[16] *Ehrhardt & Levinson, Florida's Legislative Response* to Furman, 64 J. Crim. L. & Criminology 10 (1973); Mello & Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 Fla. St. U.L. Rev. 31 (1985).

[17] *See also Garner v. State*, 9 So. 835, 847 (Fla. 1891); *Keech v. State*, 15 Fla. 591, 591 (1876) (syllabus citing the "Act of February 27, 1872, ch. 1887" for the proposition that "in capital cases, if a majority of the jury recommended the accused to the mercy of the court, the sentence must be imprisonment for life"); *id.* at 407 (same); *Metzgar v. State*, 18 Fla. 482, 483 (1881) (same); Skene, *supra*, at 301 ("For one hundred years, a jury's majority vote for life in a capital case was binding"); *cf.* W. BOWERS, LEGAL HOMICIDE 10-11 (1982) (identifying 1872 as the year Florida moved from mandatory to discretionary capital sentencing); Mello, *supra*, 18 Fla. St. U. L. Rev., at 962-970 (discussing the status of Florida's capital sentencing law as of 1845, when the state's first constitution became effective). "It is no wonder, in light of the tradition of jury sentencing, that the [Florida Supreme Court] has proclaimed great deference to jury recommendations of life." Skene, *supra*, at 302.

Florida's history of jury capital sentencing is typical. Between the mid-nineteenth century and *Furman* in 1972, United States

The definitive role of the jury's sentencing recommendation makes sense given the Florida Supreme Court's limited role in reviewing death sentences. As this Court noted in *Parker v. Dugger*, "the Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances." 110 S. Ct. at 738 (citing *Hudson v. State*, 538 So.2d 829, 831 (Fla. 1989) and *Brown v. Wainwright*, 392 So.2d 1327 (Fla. (1981)).

The Florida Supreme Court's most extensive description of its review function in capital cases occurred in *Brown v. Wainwright*, and the *Brown* formulation "now appears to be the prevailing description of the Supreme Court's role." Skene, *supra*, at 291. The question presented in *Brown* was whether the Florida Supreme Court's consideration of nonrecord material when reviewing capital sentences "led to a rash of constitutional violations ranging from a denial of due process . . . to a pervasive violation of *Gardner v. Florida*, 430 U.S. 349 (1977)." *See Brown*, 392 So.2d at 1330-1331.[18] *Brown* was brought as

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legislatures have decided with near unanimity that no person should be sentenced to die without the consent of his peers. In 1971 Justice Harlan observed that "[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, every United States jurisdiction has at some time authorized jury sentencing in capital cases." *McGautha v. California*, 402 U.S. 183, 200 n.11 (1971). The plurality in *Woodson v. North Carolina* traced this history. 428 U.S. 280, 291-92 (1976); *see also Lockett v. Ohio*, 438 U.S. 586, 598-99 (1978); W. BOWERS, *supra*, at 7-9.

[18] On the *Brown* issue generally, *see* Skene, *supra*, at 286-7; Note, *Harmless Error, Cause and Prejudice, Comity and Federalism*, 13 Stetson L. Rev. 83 (1983); Mello, *Rough Justice: Reflections on the Capital Habeas Corpus (Anti)Jurisprudence of Judge Robert S. Vance*, in *Symposium*: *Judge Vance*, 42 Ala. L. Rev. 1195, 1223-1228 (1991).

The Florida Supreme Court's curious treatment of its prior practices and cases did not begin or end with *Brown*. That court's treatment of mitigating circumstances in the years prior to *Lockett v. Ohio*, 438 U.S. 586 (1978), is an example cited by commentators, as well as by a sitting Justice of the Florida Supreme Court. *E.g.*,

a class action on behalf of a class of all 123 inmates then on Florida's death row.

These 123 inmates challenged the Florida Supreme Court's secret, *ex parte* practice of "requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal." *Id.* at 1330. The non-record material at issue "allegedly includ[ed] pre-sentence investigations, psychiatric evaluations or contact notes made in the corrections system after conviction, and psychological screening reports made after conviction by corrections personnel." *Id.*

The Florida Supreme Court rejected the constitutional challenge in *Brown*, reasoning that while "*Gardner* stands for the proposition that a sentence of death may not be imposed . . . on non-record, unchallengeable information," no error occurred because "*we do not 'impose' sentences* in capital cases." *Brown*, 322 So.2d at 1332. (emphasis added.) The Florida Supreme Court's holding in *Brown* that it was not a sentencer was the linchpin of its decision rejecting the *Gardner* claim. Significantly, had the Florida Supreme Court been acting as a sentencer, the class in *Brown*, dozens of whom remain on death row without any intervening resentencing, would be entitled to relief.

Meeks v. State, 576 So.2d 713, 718-19 (Fla. 1991) (Kogan, J., concurring); Hertz & Weisberg, *In Mitigation of the Penalty of Death*, 69 Cal. L. Rev. 317, 351 (1981) (Florida construed its capital statute "in such a way as to evade the effect of *Lockett* . . . [and] ignored statutory language and earlier case law to construe apparently exclusive statutory rosters as nonexclusive and [has] applied its new construction [] retroactively to validate sentences imposed under the previous, unconstitutional constructions"); *id.* at 356 (the retrospective construction of Florida common law is "so lacking in 'fair and substantial support' in state law as to be [a] subterfuge[] or pretext[] for evading a federal claim"); *id.* at 358 (same); Dix, *supra*, at 138 (criticizing the Florida Supreme Court for its "unwillingness" to acknowledge that its prior decisions "were wrongly decided and to rectify the error").

Twenty members of the *Brown* class have since been executed.[19]

The Florida Supreme Court in *Brown* explained its role in reviewing death sentences on direct appeal. The court described its review as having "two discrete functions." *Id.* at 1331. Initially, the court determines "if the jury and judge acted with procedural rectitude in applying [the death penalty statute] and [Florida] case law." *Id.* The court's second review function "is to ensure proportionality among death sentences which have been approved statewide."

The Florida Supreme Court held that its "role after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition.'" *Id.* at 1331. The court did not mince words:

> *Neither of our sentence review functions . . . involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances.* Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings . . . are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, *the trial court's sentence must be*

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[19] Carl Shriner, Daniel Thomas, Aubry Adams, David Funchess, James Raulerson, Raymond Clark, Marvin Francois, James Adams, Anthony Antone, Theodore Bundy, Arthur Goode, Timothy Palmes, Robert Sullivan, Buford White, Jesse Tafero, Willie Darden, Ronald Straight, Johnny Witt, Ernest Dobbert, and David Washington. All were members of the *Brown* class. *See Brown v. Wainwright*, 392 So.2d 1327 (Fla.) (style of case listing class members), *cert. denied*, 454 U.S. 1000 (1981). All have since been executed. *See NAACP*, Legal Defense and Educ. Fund, Inc., Death Row, U.S.A. (April 24, 1991) (unpublished compilation) (listing all executions subsequent to *Furman v. Georgia*, 408 U.S. 248 (1972)).

sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

Id. (emphasis added) (footnote omitted).

The Florida Supreme Court has not retreated from *Brown*; to the contrary, recent decisions of that court reaffirm that the court's role in reviewing death sentences is that of a reviewer and not that of a sentencer or resentencer. In 1989 the court reiterated that its "function in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate . . . . [and] [*i*]*t is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances.*" *Hudson v. State*, 538 So.2d 829, 831 (Fla.) (emphasis added) (citations omitted), *cert. denied*, 110 S. Ct. 212 (1989). *Hudson* reemphasized the Florida Supreme Court's position that it is precluded as a matter of state law from reevaluating the trial court record in order to substitute its own considered sentence for that of the sentencer. As the court said, "[w]e must . . . decline Hudson's invitation to reweigh the mitigating evidence and place greater emphasis on it than the trial court did." *Id.*[20]

[20] *See also, e.g., Quince v. State*, 414 So.2d 185, 187 (Fla.), *cert. denied*, 459 U.S. 895 (1982) ("Neither of our sentence review functions . . . involves weighing or reevaluating the evidence adduced to establish aggravating or mitigating circumstances"); *Lucas v. State*, 417 So.2d 250, 251 (Fla. 1982) ("This Court's role after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition'. . . . [T]he trial court's sentence must be sustained even though had we been triers of fact, we might have reached a different result in an independent evaluation"); *Bates v. State*, 465 So.2d 490, 493 (Fla. 1985) ("As a reviewing Court, we do not reweigh the evidence"); *Atkins v. State*, 497 So.2d 1200, 1203 (Fla. 1986) ("It is not this court's function to engage in a [illegible]eral *de novo* reweighing of the circumstances. Rather, we are to examine the record to ensure that the findings relied upon are supported by the evidence"); *Fitzpatrick v. State*, 527 So.2d 809, 812 (Fla. 1988) ("we must emphasize that our [proportionality] decision is not a

Thus, the Florida Supreme Court does not act as a resentencer when reviewing death sentences. The Florida Supreme Court does not conduct its own independent evaluation of the evidence in capital cases for purposes of reaching a sentencing decision, nor does it have the authority to overturn a death sentence (or for that matter to enter one) where the sentence imposed is supported properly.[21] Consequently, the Florida Supreme Court does not act as a resentencing court on direct appeal.

reweighing of aggravating and mitigating circumstances"); *Freeman v. State*, 563 So.2d 73, 77 (Fla. 1990) ("It is not this Court's function to reweigh these circumstances").

[21] Eleventh Circuit Chief Judge Tjoflat has cited some pre-*Brown* cases as illustrating confusion about the appellate role played by the Florida Supreme Court when it reviewed death sentences on direct appeal. *Ford v. Strickland*, 696 F.2d 804, 837 (11th Cir. 1982), *cert. denied*, 464 U.S. 865 (1983) (Tjoflat, J., concurring and dissenting) (citing *Elledge v. State*, 346 So.2d 998 (Fla. 1977), *cert. denied*, 459 U.S. 981 (1982); *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974) and *Ford v. State*, 374 So.2d 496 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980)); *Booker v. Dugger*, 922 F.2d 633, 636 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 277 (1991) (Tjoflat, J., specially concurring) (citing *Goode v. State*, 365 So.2d 381 (Fla. 1978)).

The cases cited by Judge Tjoflat are not confusing in light of the Florida Supreme Court's definitive opinion in *Brown*. First, all were decided pre-*Brown*. Second, the cases are consistent with *Brown* itself. These cases represented the proportionality review that the Florida Supreme Court conducts prior to affirming or vacating a death sentence, not resentencing. *See Lewis v. State*, 568 So.2d 18, 23 (Fla. 1991) (Florida Supreme Court's proportionality review does not involve reweighing of aggravating and mitigating circumstances); *Fitzpatrick v. State*, 527 So.2d 809, 812 (Fla. 1988) (same). In none of those cases was the court purporting to reassess the evidence for purposes of imposing a sentence.

This is suggested by the fact that the Florida Supreme Court did not sentence the condemned appellant in *Elledge* after finding harmful error. If the court acted as a resentencer, it would have reevaluated the record without considering the impermissible evidence, weighed the aggravating and mitigating factors and imposed a sentence. However, since the court was not a sentencer, it remanded the case for resentencing by the trial court. *Elledge*, 346 So.2d at 1003.

CONCLUSION

Florida has chosen to make the capital sentencing jury the principal actor is deciding who dies in Florida. That leading role is not diminished by the duties of the supporting actors: the trial judge and the Florida Supreme Court. For this reason, the jury--the only real sentencer in Florida—must be told the limiting definitions of the facially vague heinousness aggravating circumstance.

Respectfully submitted,

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APPENDICES

APPENDIX A

FLORIDA SUPREME COURT LIFE OVERRIDE DECISIONS ON DIRECT APPEAL, 1974-DECEMBER 1991

Since 1974, the Florida Supreme Court has rendered 127 opinions on direct appeal in capital cases in which a sentence of death was imposed by the trial court following a jury recommendation of life imprisonment. These 127 decisions involved 118 condemned people, since in one case (Ziegler) the override was affirmed twice by the Florida Supreme Court, in four cases (Dobbert, Spaziano, Porter, and Engle) the override was affirmed after that court had remanded the matter for further sentencing proceedings, and in four cases (Douglas, Barclay, Buford, and McCrae) the Florida Supreme Court imposed a life sentence on direct appeal after it had initially affirmed the override, but the sentence had been subsequently set aside in collateral proceedings.

Of the total 127 jury override cases considered on direct appeal, the Florida Supreme Court has set aside the death sentence and imposed a sentence of life in 78, reversed the conviction in 12, remanded for further sentencing proceedings in five, and affirmed the override in 33. The cases total 128, because in one double jeopardy case (Wright in 1991) the court both reversed the conviction and ordered the trial court to impose a life sentence should the prisoner be reconvicted of first degree murder.

The year by year breakdown of affirmances, life sentences, reversals, and remands for further sentencing is set out below. Following this breakdown is a listing of the Florida Supreme Court's direct appeal jury override decisions.

Year	Life Mandated	Death Aff'd	Conviction Rev'd	Remanded	Total
1991	10	1	1	0	12
1990	5	0	0	0	5
1989	5	1	0	0	6
1988	8	1	1	0	10
1987	5	1	0	0	6
1986	4	1	3	0	8
1985	2	4	1	0	7
1984	2	7	2	0	11
1983	7	3	1	1	12
1982	4	3	2	0	9
1981	8	5	0	3	16
1980	3	0	1	0	4
1979	2	1	0	0	3
1978	2	1	0	0	3
1977	3	1	0	0	4
1976	4	1	0	1	6
1975	3	2	0	0	5
1974	1	0	0	0	1
Total	78	33	12	5	128

LISTING OF FLORIDA SUPREME COURT JURY OVERRIDE DECISIONS BY YEAR

Citation	Disposition
1991	
1. *Ziegler v. State*, 500 So.2d 127 (Fla. 1991).	Aff'd.
2. *Douglas v. State*, 575 So.2d 165 (Fla. 1991).	Life sentence on appeal.
3. *Downs v. State*, 574 So.2d 1095 (Fla. 1991).	Life sentence on appeal.
4. *Hegwood v. State*, 575 So.2d 170 (Fla. 1991).	Life sentence on appeal.
5. *Dolinski v. State*, 576 So.2d 271 (Fla. 1991).	Life sentence on appeal.
6. *Cooper v. State*, 581 So.2d 49 (Fla. 1991).	Life sentence on appeal.
7. *Wright v. State*, 586 So.2d 1024 (Fla. 1991).	Conviction reversed; death precluded on retrial, so in effect life sentence on appeal.
8. *McCrae v. State*, 582 So.2d 613 (Fla. 1991).	Life sentence on appeal.
9. *Craig v. State*, 585 So.2d 278 (Fla. 1991).	Life sentence on appeal.
10. *Bedford v. State*, 16 Fla. L. Week. S. 665, WL 1991 201666 (Fla. Oct. 10, 1991).	Life sentence on appeal.
11. *Savage v. State*, 16 Fla. L. Week. S. 647 (Fla. 1991).	Life sentence on appeal.

Citation	Disposition
1990	
1. *Morris v. State*, 557 So.2d 27 (Fla. 1990).	Life sentence on appeal.
2. *Hallman v. State*, 560 So.2d 223 (Fla. 1990).	Life sentence on appeal.
3. *Carter v. State*, 560 So.2d 1160 (Fla. 1990).	Life sentence on appeal.
4. *Cheshire v. State*, 568 So.2d 908 (Fla. 1990).	Life sentence on appeal.
5. *Buford v. State*, 570 So.2d 923 (Fla. 1990).	Life sentence on appeal.
1989	
1. *Thompson v. State*, 553 So.2d 153 (Fla. 1989).	Aff'd.
2. *Pentecost v. State*, 545 So.2d 861 (Fla. 1989).	Life sentence on appeal.
3. *Freeman v. State*, 547 So.2d 125 (Fla. 1989).	Life sentence on appeal.
4. *Cochran v. State*, 547 So.2d 928 (Fla. 1989).	Life sentence on appeal.
5. *Fuente v. State*, 549 So.2d 652 (Fla. 1989).	Life sentence on appeal.
6. *Christian v. State*, 550 So.2d 450 (Fla. 1989).	Life sentence on appeal.
1988	
1. *Torres-Arboledo v. State*, 524 So.2d 403 (Fla. 1988).	Aff'd.
2. *Brown v. State*, 526 So.2d 903 (Fla. 1988).	Life sentence on appeal.
3. *Burch* v. *State*, 522 So.2d 810 (Fla. 1988).	Life sentence on appeal.

Citation	Disposition
4. *Collier v. State*, 523 So.2d 158 1988).	Life sentence on appeal.
5. *DuBoise v. State*, 520 So.2d 260 (Fla. 1988).	Life sentence on appeal.
6. *Harmon v. State*, 527 So.2d 182 (Fla. 1988).	Life sentence on appeal.
7. *Holsworth v. State*, 522 So.2d 348 (Fla. 1988).	Life sentence on appeal.
8. *Perry v. State*, 522 So.2d 817 (Fla. 1988).	Life sentence on appeal.
9. *Spivey v. State*, 529 So.2d 1088 (Fla. 1988).	Life sentence on appeal.
10. *Merritt v. State*, 523 So.2d 573 (Fla. 1988).	Conviction reversed.
1987	
1. *Engle v. State*, 510 So.2d 881 (Fla. 1987).	Aff'd. after remand.
2. *Fead v. State*, 512 So.2d 176 (Fla. 1987).	Life sentence on appeal.
3. *Ferry v. State*, 507 So.2d 1373 (Fla. 1987).	Life sentence on appeal.
4. *Hansbrough v. State*, 509 So.2d 1081 (Fla. 1987).	Life sentence on appeal.
5. *Masterson v. State*, 516 So.2d 256 (Fla. 1987).	Life sentence on appeal.
6. *Wasko v. State*, 505 So.2d 1314 (Fla. 1987).	Life sentence on appeal.
1986	
1. *Echols v. State*, 484 So.2d 568 (Fla. 1986).	Aff'd.

Citation	Disposition
2. *Amazon v. State*, 487 So.2d 8 (Fla. 1986).	Life sentence on appeal.
3. *Brookings v. State*, 495 So.2d 135 (Fla. 1986).	Life sentence on appeal.
4. *Irizarry v. State*, 496 So.2d 822 (Fla. 1986).	Life sentence on appeal.
5. *Van Royal v. State*, 497 So.2d 625 (Fla. 1986).	Life sentence on appeal.
6. *Nelson v. State*, 490 So.2d 32 (Fla. 1986).	Conviction reversed.
7. *Ramos v. State*, 496 So.2d 121 (Fla. 1986).	Conviction reversed.
8. *Thompson v. State*, 494 So.2d 203 (Fla. 1986).	Conviction reversed.
1985	
1. *Brown v. State*, 473 So.2d 1260 (Fla. 1985).	Aff'd.
2. *Burr v. State*, 466 So.2d 1051 (Fla. 1985).	Aff'd.
3. *Francis v. State*, 473 So.2d 673 (Fla. 1985).	Aff'd.
4. *Mills v. State*, 476 So.2d 172 (Fla. 1985).	Aff'd.
5. *Barclay v. State*, 470 So.2d 691 (Fla. 1985).	Life sentence on appeal.
6. *Huddleston v. State*, 475 So.2d 204 (Fla. 1985).	Life sentence on appeal.
7. *Brown v. State*, 471 So.2d 6 (Fla. 1985).	Conviction reversed.
1984	
1. *Eutzy v. State*, 458 So.2d 755 (Fla. 1984).	Aff'd.

Citation	Disposition
2. *Gorham v. State*, 454 So.2d 556 (Fla. 1984).	Aff'd.
3. *Groover v. State*, 458 So.2d 226 (Fla. 1984).	Aff'd.
4. *Heiney v. State*, 447 So.2d 210 (Fla. 1984).	Aff'd.
5. *Lusk v. State*, 446 So.2d 1038 (Fla. 1984).	Aff'd.
6. *Parker v. State*, 458 So.2d 750 (Fla. 1984).	Aff'd.
7. *Thomas v. State*, 456 So.2d 454 (Fla. 1984).	Aff'd.
8. *Rivers v. State*, 458 So.2d 762 (Fla. 1984).	Life sentence on appeal.
9. *Thompson v. State*, 456 So.2d 444 (Fla. 1984).	Life sentence on appeal.
10. *Livingston v. State*, 458 So.2d 235 (Fla. 1984).	Conviction reversed.
11. *Livingston v. State*, 441 So.2d 1083 (Fla. 1984).	Conviction reversed.
1983	
1. *Routly v. State*, 440 So.2d 1257 (Fla. 1983).	Aff'd.
2. *Porter v. State*, 429 So.2d 293 (Fla. 1983).	Aff'd after remand.
3. *Spaziano v. State*, 433 So.2d 508 (Fla. 1983).	Aff'd after remand.
4. *Engle v. State*, 438 So.2d 803 (Fla. 1983).	Remand for judge resentencing.
5. *Cannady v. State*, 427 So.2d 723 (Fla. 1983).	Life sentence on appeal.
6. *Hawkins v. State*, 436 So.2d 44 (Fla. 1983).	Life sentence on appeal.

Citation	Disposition
7. *Herzog v. State*, 439 So.2d 1372 (Fla. 1983).	Life sentence on appeal.
8. *Norris v. State*, 429 So.2d 638 (Fla. 1983).	Life sentence on appeal.
9. *Richardson v. State*, 437 So.2d 1091 (Fla. 1983).	Life sentence on appeal.
10. *Washington v. State*, 432 So.2d 44 (Fla. 1983).	Life sentence on appeal.
11. *Webb v. State*, 433 So.2d 496 (Fla. 1983).	Life sentence on appeal.
12. *Andrews v. State*, 443 So.2d 78 (Fla. 1983).	Conviction reversed.
1982	
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2. *Miller v. State*, 415 So.2d 1262 (Fla. 1982).	Aff'd.
3. *Stevens v. State*, 419 So.2d 1058 (Fla. 1982).	Aff'd.
4. *Gilvin v. State*, 418 So.2d 996 (Fla. 1982).	Life sentence on appeal.
5. *McCampbell v. State*, 421 So.2d 1072 (Fla. 1982).	Life sentence on appeal.
6. *McCray v. State*, 416 So.2d 804 (Fla. 1982).	Life sentence on appeal.
7. *Walsh v. State*, 418 So.2d 1000 (Fla. 1982).	Life sentence on appeal.
8. *Bryant v. State*, 412 So.2d 347 (Fla. 1982).	Conviction reversed.
9. *Jaramillo v. State*, 417 So.2d 257 (Fla. 1982).	Conviction reversed.
1981	
1. *Buford v. State*, 403 So.2d 943 (Fla. 1981).	Aff'd.

Citation	Disposition
2. *Johnson v. State*, 393 So.2d 1069 (Fla. 1981).	Aff'd.
3. *McCrae v. State*, 395 So.2d 1145 (Fla. 1981).	Aff'd.
4. *White v. State*, 403 So.2d 331 (Fla. 1981).	Aff'd.
5. *Ziegler v. State*, 402 So.2d 365 (Fla. 1981).	Aff'd.
6. *Lewis v. State*, 398 So.2d 432 (Fla. 1981).	Remand for judge sentencing.
7. *Spaziano v. State*, 393 So.2d 1119 (Fla. 1981).	Remand for judge resentencing.
8. *Porter v. State*, 400 So.2d 5 (Fla. 1981).	Remand for limited hearing.
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14. *Smith v. State*, 403 So.2d 933 (Fla. 1981).	Life sentence on appeal.
15. *Stokes v. State*, 403 So.2d 377 (Fla. 1981).	Life sentence on appeal.
16. *Welty v. State*, 402 So.2d 1159 (Fla. 1981).	Life sentence on appeal.

Citation	Disposition
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1. *Neary v. State*, 384 So.2d 881 (Fla. 1980).	Life sentence on appeal.
2. *Phippen v. State*, 381 So.2d 991 (Fla. 1980).	Life sentence on appeal.
3. *Willams v. State*, 386 So.2d 538 (Fla. 1980).	Life sentence on appeal.
4. *Hall v. State*, 381 So.2d 683 (Fla. 1980).	Conviction reversed.
1979	
1. *Dobbert v. State*, 375 So.2d 1069 (Fla. 1979).	Affirmed after remand.
2. *Brown v. State*, 367 So.2d 616 (Fla. 1979).	Life sentence on appeal.
3. *Malloy v. State*, 382 So.2d 1190 (Fla. 1979).	Life sentence on appeal.
1978	
1. *Hoy v. State*, 353 So.2d 826 (Fla. 1978).	Aff'd.
2. *Buckrem v. State*, 355 So.2d 111 (Fla. 1978).	Life sentence on appeal.
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1977	
1. *Barclay v. State*, 343 So.2d 1266 (Fla. 1977).	Aff'd.
2. *Burch v. State*, 343 So.2d 831 (Fla. 1977).	Life sentence on appeal.
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1976	
1. *Douglas v. State*, 328 So.2d 18 (Fla. 1976).	Aff'd.
2. *Chambers v. State*, 339 So.2d 204 (Fla. 1976).	Life sentence on appeal.
3. *Jones v. State*, 332 So.2d 615 (Fla. 1976).	Life sentence on appeal.
4. *Provence v. State*, 337 So.2d 783 (Fla. 1976).	Life sentence on appeal.
5. *Thompson v. State*, 328 So.2d 1 (Fla. 1976).	Life sentence on appeal.
6. *Dobbert v. State*, 328 So.2d 433 (Fla. 1976).	Affirmed, but later remanded for limited hearing (see 1979).
1975	
1. *Gardner v. State*, 313 So.2d 675 (Fla. 1975).	Aff'd.
2. *Sawyer v. State*, 313 So.2d 680 (Fla. 1975).	Aff'd.
3. *Slater v. State*, 316 So.2d 539 (Fla. 1975).	Life sentence on appeal.
4. *Swan v. State*, 322 So.2d 485 (Fla. 1975).	Life sentence on appeal.
5. *Tedder v. State*, 322 So.2d 908 (Fla. 1975).	Life sentence on appeal.
1974	
1. *Taylor v. State*, 294 So.2d 648 (Fla. 1974).	Life sentence on appeal.

APPENDIX B

DISPOSITION OF THE FIRST 66 FLORIDA CAPITAL HOMICIDE CASES ON APPEAL

Disposition	No.	%
Conviction and Sentence Affirmed	33	50
Jury Recommendation: Life	(5)	(5)
Jury Recommendation: Death	(25)	(76)
Not available (or no jury)	(3)	(9)
Conviction Reversed	8	12
Sentence Invalidated for Procedural Reasons	10	15
Sentence Reduced on Merits	15	23
Jury Recommendation: Life	(13)	(88)
Jury Recommendation: Death	(1)	(6)
Not available (or no jury)	(1)	(6)
	66	100

Source: Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97, 125 (1979).

APPENDIX C

DELAWARE'S 1991 CAPITAL STATUTE

1. S.B. 91, Substitute 1

DELAWARE STATE SENATE
136TH GENERAL ASSEMBLY

SENATE SUBSTITUTE NO. 1, OCTOBER 24, 1991
TO
SENATE BILL, NO. 79

AN ACT TO AMEND TITLE 11, DELAWARE CODE RELATING TO THE IMPOSITION OF THE DEATH PENALTY

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Section 4209(c)(3). Title 11, Delaware Code by striking subsection (c)(3) in its entirety and inserting in lieu thereof the following:

(3)(a) Upon the conclusion of the evidence and arguments the judge shall give the jury appropriate instructions and the jury shall retire to deliberate and recommend to the Court an answer to the following questions:

(i) Whether the evidence shows beyond a reasonable doubt the existence of at least one aggravating circumstance as enumerated in subsection (e) of this section; and

(ii) Whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities

of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

(b) The jury shall report to the Court its final vote by the number of each affirmative and negative votes on each question.

Section 3. Amend Section 4209(d). Title 11, Delaware Code by striking Section 4209(d) in its entirety and inserting in lieu thereof the following:

(d) Determination of sentence. (1) A sentence of death shall be imposed, after considering the recommendation of the jury, if a jury is impaneled, if the Court finds:

(1) (a) Beyond a reasonable doubt at least one statutory aggravating circumstance; and

(b) By a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist.

(2) Otherwise, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without benefit of probation or parole or any other reduction.

(3) If the Court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence or death is based.

Section 3. Amend Section 4209(c)(1) by striking the words "jury, unanimously, or judge when applicable," and inserting in lieu thereof the word "judge."

Section 4. Amend Section 4209(g)(2) by striking the words "jury's or."

Section 5. Amend Section 4209(g)(4) by striking subsection (b) and relettering the remaining subsections

Section 6. This act shall become effective immediately upon the signature of the Governor and shall apply to all defendants tried or sentenced after its effective date.

2. Certificate of Questions of Law, *State v. Cohen*

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Criminal Action Numbers IN-90-02-0474
through IN-90-02-0477

STATE OF DELAWARE

v.

CHARLES M. COHEN,
Defendant.

CERTIFICATE OF QUESTIONS OF LAW

This 6th day of November, 1991, the Court having found that:

1. The nature and stage of the proceedings are:

(a) The above-captioned case is a capital murder case.

(b) Jury selection was scheduled to start on Novber 5, 1991. Trial was scheduled to start on November 25, 1991.

(c) On Monday, November 4, 1991, the Governor signed Senate Substitute 1 for Senate Bill 79 which amends 11 *Del. C.* § 4209 relating to the imposition of the death penalty, now Vol. 68, Ch. 181 *Del. Laws* [new law].

(d) The defendant has moved to preclude application of the new law to the determination of the defendant's punishment.

(e) The Court indicated to counsel at an office conference held immediately following learning of the Governor's signature that it was inclined to certify various issues (see below) which would necessarily cause a delay in jury selection and trial. Notice of excusal of jurors was communicated by media and the Court's message phone after 6:00 p.m. on November 4, 1991. A tentative new trial date of February 12, 1992 has been set.

(f) The State agrees that certification should be sought. The defendant prefers that the issues raised herein be decided by this Court. The defendant claims his right to a speedy trial is denied by any further delay.

2. The following facts are undisputed:

(a) The defendant is accused of two murders which allegedly occurred on or about November 12, 1988.

(b) On the date of the alleged murders, the statutory process for the determination of the defendant's punishment, if found guilty, was determined by 11 *Del. C.* § 4209 as it existed prior to the enactment of the new law.

(c) Section 6 of the new law provides:

> This act shall become effective immediately upon the signature of the Governor and shall apply to all defendants tried or sentenced after its effective date.

(d) By virtue of this provision, the defendant in this case would be covered by the new law.

(e) The State has informed the Court that the new law applies to this defendant.

(f) In the new law, the jury, at the penalty phase, makes a recommendation to the Court by way of answers to the following questions:

(i) Whether the evidence shows beyond a reasonable doubt the existence of at least one statutory aggravating circumstance as enumerated in 11 *Del. C.* § 4209(c); and

(ii) Whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating factors found to exist.

(g) Under the new law, the jury makes a report to the trial judge of its answers stating the number of affirmative and negative votes on each of the above two questions.

(h) Under the new law, the next step in the punishment determination is as follows:

(1) A sentence of death shall be imposed, after considering the recommendation of the jury, if a jury is impaneled, if the Court finds:

a. Beyond a reasonable doubt at least 1 statutory aggravating circumstance; and

b. By a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that

the aggravating circumstances found *by the Court* to exist outweigh the mitigating circumstances found *by the Court* to exist.

(2) Otherwise, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without benefit of probation or parole or any other reduction.

(3) If the Court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based.

(i) Under 11 *Del. C.* § 4209, as it existed on November 12, 1988 and up to November 4, 1991, the:

(i) jury could find that aggravating circumstances existed and that such aggravating circumstances outweigh the mitigating circumstances but still decide that the death penalty should not be imposed; and

(ii) trial judge was bound by the jury's verdict in that circumstance and was required to impose a sentence of life without benefit of probation or parole.

(j) Under the new law, effective November 4, 1991:

(i) the jury, after making certain finds, makes a recommendation to the trial judge; and

(ii) the trial judge is not bound by the jury's recommendation; and

(iii) if the trial judge finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after weighing certain factors, finds by a preponderance of the evidence that the aggravating circumstances outweigh the mitigating circumstances, the trial judge shall impose the death penalty.

3. The questions of law set forth below should be certified to the Supreme Court of the State of Delaware for the following reasons:

(a) The new law changes the manner in which the determination of the defendant's potential punishment, if any, is determined.

(b) The new law, by its own provisions, is retroactive to this defendant who allegedly committed two murders prior to its enactment.

(c) The Superior Court of the State of Delaware currently has pending capital murder cases against sixteen defendants (statewide). In all these cases, the alleged crimes occurred prior to the enactment of the new law.

(d) The new law contains no severability clause and no savings clause. It repeals the former provisions of 11 *Del. C.* § 4209 which provided for the jury to determine punishment.

(e) Should the new law be found to be unconstitutional in its entirety, the question arises whether Delaware would be left without a death penalty for first degree murder.

(f) The new law removes from the jury the determination of punishment in capital cases and places that responsibility in the hands of the trial judge.

(g) The questions of law involved relate to the constitutionality of the new law, the constitutionality of its retroactive application, to its construction and application which have not been, but should be settled, by the Delaware Supreme Court.

4. The important and urgent reasons for an immediate determination by the Supreme Court of the questions certified are:

(a) Should the new law be declared to be unconstitutional in its entirety and to have repealed the former law, Delaware could be left without a death penalty for first degree murder which would appear to be inconsistent with the wishes of the General Assembly and the Governor.

(b) Of the above-described sixteen pending capital defendants, six, including this case, are scheduled to start jury selection between today's date and January 6, 1992 (November 13, 1991, December 2, 1991, December 4, 1991 and January 6, 1992).

(c) Lack of resolution of the constitutional issues created by the enactment of the new law prior to the trial of this case and the five others now scheduled for the trial could cause unnecessary appeals, extraordinary expense, delay, confusion and possible retrial(s).

(d) The constitutional issues involved with this case caused by the enactment of the new law transcend all pending cases. One adversarial proceeding in the Supreme Court by means of certification prior to the commencement of any pending capital case could remove all potential confusion and later harm or disruption created by proceeding to trial without certification and following the normal appellate process.

(e) Defense counsel have indicated that proposed *voir dire* questions would have to be altered by virtue of the new law. Specifically, the defense claims any trial and/or penalty jury would no longer have to be "death qualified". This Court tends to agree that additional new and significantly different questions may have to be asked because of the new law. This Court is reluctant to so amend those questions without knowing the answers to the questions to be certified, that

is, whether the new law is constitutional or unconstitutional.

(f) The Supreme Court has historically accepted certification of questions similar to those raised in this case. *State v. Dickerson*, Del. Supr., 298 A.2d 761 (1972); *State v. White*, Del. Supr., 395 A.2d 1082 (1978).

5. Counsel for the parties are:

(a) For the State:

Stephen M. Walther, Esq.
Assistant State Prosecutor
Robert J. O'Neill, Jr., Esq.
Deputy Attorney General

(b) For the defendant:

J. Dallas Winslow, Jr., Esq.
Nancy Jane Perillo, Esq.
Assistant Public Defenders

6. The Court recommends and the parties have agreed to the following order for briefing:

(a) Defendant's opening brief
(b) State's answering brief
(c) Defendant's reply brief

The parties have requested, and this Court recommends, consistent with the issues involved, an expedited schedule.

NOW, THEREFORE, IT IS ORDERED that the following questions of law are certified to the Supreme Court of the State of Delaware for disposition in accordance with Rule 41 of the Supreme Court:

1. Does the new law mandate imposition of a death penalty, if the sentencing Court makes its findings required under 11 *Del. C.* § 4209(d)(1)(a) and (b) against the defendant?

2. If the answer to certified question 1 is "yes," does the new law violate the Eighth Amendment to the United States Constitution and/or the cruel punishments' clause of Article 1, Section 11 of the Delaware Constitution?

3. If the answer to certified question 1 is "yes," does the new law violate the due process clause of the Fourteenth Amendment to the United States Constitution, the Eighth Amendment to the United States Consitution, the due process clause of Article 1, Section 7 of the Delaware Constitution and/or the cruel punishments' clause of Article I, Section 11 of the Delaware Constitution, in that a death sentence is mandated without a finding that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt?

4. Does the new law, by designating the Court as the sentencing authority in capital cases here, violate the defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution and/or Article I, Section 4, and Article IV, Section 19 of the Delaware Constitution and related Delaware statutory and court rule provisions, to a trial by jury on the issue of punishment?

5. Should the new law be found constitutionally inform under any of the grounds set forth in certified questions 2, 3 or 4, what law applies to the sentencing of defendants convicted of first degree murder for offenses committed prior to the effective date of those provisions?

6. Should the new law be found constitutionally infirm under any of the grounds set forth in certified questions 2, 3, or 4, what law applies to the sentencing of defendants convicted of first degree murder for offenses committed after the effective date of those provisons?

7. Should the revised provisions of the new law be found constitutionally or otherwise infirm in any limited respect, are those provisions severable?

8. Is the application of the new law to all defendants tried or sentenced after its effective date violative of the *ex post facto* clause of Article I, Section 10 of the United States Constitution or any other provision of the United States Constitution?

9. Is the application of the new law to all defendants tried or sentenced after its effective date violative of the due process clause of Article I, Section 7 of the Delaware Constitution with respect to the determination of punishment or any other provision of the Delaware Constitution?

10. Since the new law provides that the jury make a recommendation only, does the jury have to be "death qualified?"

/s/ [Illegible]

FILED
JAN 2 1992
OFFICE OF THE CLERK

No. 91-5813

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DENNIS SOCHOR,
Petitioner,

v.

STATE OF FLORIDA
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE VOLUNTEER LAWYERS RESOURCE CENTER OF FLORIDA, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-5843

DENNIS SOCHOR, *Petitioner*,

v.

STATE OF FLORIDA *Respondent.*

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE VOLUNTEER LAWYERS RESOURCE CENTER OF FLORIDA, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS CURIAE*

Written consent from all parties to the filing of this *amicus curiae* brief accompanies this document.

The Volunteer Lawyers' Resource Center of Florida, Inc. (VLRC) was established in November, 1988 for the purpose of providing support and assistance to private counsel who represent indigent, death-sentenced individuals on a pro bono basis in collateral post-conviction proceedings. Numerous death-sentenced individuals represented by pro bono counsel assisted by the VLRC were sentenced to death based in part on the aggravating circumstance that they committed a crime in an especially heinous, atrocious, or cruel manner over claims that this aggravator was unconstitutionally vague. As a result,

the VLRC has a strong interest in the resolution of this claim.

SUMMARY OF THE ARGUMENT

The Eighth Amendment to the United States Constitution requires clear and objective standards to guide the discretion of the sentencer and narrow the class of the death eligible. If an aggravating circumstance is used to narrow the class of death eligible and is weighed against mitigation to determine the appropriate sentence, then it must provide meaningful guidance; a vague aggravator applicable to any murder leaves the sentencer with the open-ended discretion condemned in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *See Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 1859, 100 L.Ed.2d 372 (1988). Florida's statute aggravates a crime if it is "especially heinous, atrocious, or cruel." § 921.141(5)(h), Fla. Stat. (1989). As was the identical language of Oklahoma's aggravator in *Cartwright*, this wording is too vague to give meaningful guidance.

The Florida Supreme Court, considering all its case law, has not adopted a single, appropriately limited construction of this facially vague circumstance. It has instead created a large number of definitions of the circumstance, many traceable to the confusing language of its first opinion construing the aggravator, *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). Although Justice Stewart's plurality opinion in *Proffitt v. Florida*, 428 U.S. 242, 255-6, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) stated the expectation that Florida would limit the circumstance using one part of *Dixon's* language—that there be a conscienceless or pitiless crime which was unnecessarily torturous—Florida has instead created a menu of definitions, relying on numerous varying definitions of the circumstance.

Florida sometimes explicitly relies on all or some of the words of *Dixon*—that an evil, wicked, or vile crime

aggravates the sentence—which this Court in *Shell v. Mississippi*, 111 S.Ct. 313 (1990) held did not cure the facial vagueness of a heinous aggravator. The *Dixon* construction as a whole is similarly infected with these vague and inflammatory terms; the 'unnecessarily torturous' language in *Dixon* which potentially could limit the circumstance is instead listed as only one example of a heinous offense. Indeed, both Mississippi and Oklahoma, like Florida, relied on the vague phraseology of *Dixon* when they attempted, but failed, to correct their facially vague heinous circumstances. The Florida courts also rely on another part of *Dixon*—that some undefined additional act be present to make the murder especially heinous—to affirm heinousness findings.

Florida courts sometimes rely on other definitions which have no direct connection to *Dixon* to find crimes heinous. These alternates are themselves unlimited, e.g. deciding a method of killing can make a crime heinous, and then finding virtually any such method so qualified the offense. The Florida Supreme Court has also explicitly held that sentencers may rely on the undefined totality of the circumstances in finding a crime heinous, similar to the reasoning of the Oklahoma courts which caused the Tenth Circuit and this Court to strike Oklahoma's heinous aggravator.

Many of these alternate descriptions of what heinousness means have no limit; some have a potential limit, but the class of cases described as not heinous does not coincide with that class under other descriptions. None of these cases overrule one another except perhaps the statement in *Pope v. State*, 441 So.2d 1073 (Fla. 1984), that defining cruel as "designed to inflict a high degree of pain; *utter indifference to, or enjoyment of, the suffering of others; pitiless.*" should no longer be considered in defining the heinous circumstance. *Id.* at 1077. Because Florida has created and maintains multiple meanings of its heinous circumstance, many of which could

not limit the facially vague words of the statute, sentencers in Florida are left with a complete lack of meaningful guidance on what it means in any given case. The Florida Supreme Court's own flatly inconsistent holdings on factually indistinguishable cases show even that court cannot find meaningful guidance in its cases.

ARGUMENT

THE FLORIDA SUPREME COURT'S CONSTRUCTION OF THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE FAILS TO OFFER ANY GUIDANCE TO OR PLACE ANY LIMITS ON THE DISCRETION OF THE SENTENCER RESULTING IN AN ARBITRARY SENTENCING SCHEME CONTRARY TO THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. The Constitution Requires Reasoned, Nonarbitrary Application of the Death Penalty Which Entails Use of Clear, Objectively Defined Guides to the Sentencers' Discretion and Limits to the Class of the Death Eligible.

In 1972, the United States Supreme Court struck the death penalty statutes then in force as contrary to the constitution's cruel and unusual punishment prohibition. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). A plurality of this Court later explained this result:

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

A vague aggravating circumstance that:

> fails adequately to inform juries what they must find in order to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman* . . .

violates the Eighth Amendment. *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 1859, 100 L.Ed.2d 372 (1988). This is so because the vague aggravator:

> "fail[s] adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur" . . . [*quoting Gregg*, 428 U.S. at 195 n.46] To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 876-7, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). To narrow the class of the death eligible and channel the discretion of sentencers using aggravating circumstances requires "clear and objective standards so as to produce nondiscriminatory application." *Gregg*, 428 U.S. at 198, *quoting Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974); *see Godfrey v. Georgia*, 446 U.S. 420, 422, 432-3, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *see also McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987) (rejecting claim that racial disparities in application of death penalty show Eighth Amendment violation on the grounds that states are required to narrow sentencers' discretion by rational criteria which facts of particular case must meet).

B. Florida's Especially Heinous, Atrocious, or Cruel Aggravating Circumstance Is Facially Vague.

It is beyond cavil that the vagueness of permitting sentencers to aggravate a capital felony if they find that it "was especially heinous, atrocious, or cruel," § 921.141(5)(h), Fla. Stat. (1989), creates uncontrolled

sentencer discretion. *See Cartwright*, 108 S.Ct. at 1859; *Godfrey*, 446 U.S. at 433) (vile, horrible, inhuman aggravator violates Eighth Amendment); *Walton v. Arizona*, —— U.S. ——, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990). The *Cartwright* decision squarely addresses this issue:

> First, the language of the Oklahoma aggravating circumstance at issue—"especially heinous, atrocious, or cruel"—gave no more guidance than the "outrageously or wantonly vile, horrible, or inhuman" language that the jury returned in its verdict in *Godfrey* . . . To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous."

Cartwright, 108 S.Ct. at 1859. Florida's statute is identical, and the unanimous opinion in *Cartwright* compels the finding that its words are identically vague.

C. Numerous Definitions of Florida's Heinous Aggravating Circumstance Exist, Some Unlimited and Some Potentially Limited in Varying Ways.

A state court may construe a vague capital sentencing aggravator to save it from constitutional attack. *See Walton*, 110 S.Ct. at 3057; *Lewis v. Jeffers*, —— U.S. ——, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). In *Walton*, this Court found the Arizona Supreme Court had successfully limited its definition of its especially heinous, cruel, or depraved aggravator. *Walton*, 110 S.Ct. at 3051. The Arizona Court had undertaken to define each of the disjunctive phrases. The Arizona courts defined 'cruel' as inflicting "mental anguish or physical abuse before the victim's death," and mental anguish includes the victim's uncertainty over his fate. *Id.* at 3057-8. 'Depraved' under the statute means relishing the murder or indifference to suffering together with a sense of pleas-

ure. *Id.* at 3058. This court found that each definition "gives meaningful guidance to the sentencer." *Id.* at 3058; *see Lewis*, 110 S.Ct. at 3100.

The Florida Supreme Court has never adopted a single limiting construction of the heinous aggravator that would provide meaningful guidance to the sentencers.[1] Instead, it has stated numerous varying definitions of the aggravator. Some of these definitions provide no limit at all; others could potentially provide a limit, but the Florida Supreme Court has never overruled contrary definitions of the heinous aggravating circumstance appearing in other cases. Because that court has never held that one limited definition and only that limited definition is the proper construction of Florida's heinous circumstance, it has failed to limit the aggravator by a clear and objective principle which provides meaningful guidance to the sentencer. In any particular case, trial courts and the Florida Supreme Court itself have a menu of definitions of the heinous aggravating circumstance from which to choose; since some of those menu choices apply to all crimes and virtually any capital crime could fit into one of the other varying, if potentially limited definitions, this construction of the circumstance does not provide meaningful guidance even to those aware of the case law.[2]

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[1] This brief will refer to the especially heinous, atrocious, or cruel aggravating circumstance as the heinous aggravating circumstance; as will be seen, Florida has not defined and applied the disjunctive phrases of the circumstance as did Arizona, but instead applied the circumstance as a whole to each crime.

[2] In this case, Mr. Sochor's jury was never told any definition of the heinous aggravating circumstance beyond the statute's vague words. *Walton* distinguishes *Cartwright* in part because the Oklahoma jury was never informed of any limit to the Oklahoma aggravator whereas in Arizona, the judge sentenced and presumably knew the law. In this sense, Mr. Sochor's case is much closer to *Cartwright*, but this argument is beyond the scope of this brief.

1. *The Lengthy Construction of the Heinous Circumstance Appearing in* State v. Dixon *Does Not Itself Limit the Heinous Circumstance and Has Been Broken Down to Several Components, Some of Which Are Unlimited, Yet Have Been Relied Upon To Find the Circumstance.*

In its first ruling on Florida's post-*Furman* death statute, the court defined the aggravator thusly:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). This construction has three parts:

> 1) the 'definitions' of heinous, atrocious, and cruel, including that they are evil, wicked, or vile;
>
> 2) a kind of crime intended to be included, namely one accompanied by additional acts setting it apart from other capital felonies;
>
> 3) and, another example, "the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

When this Court first considered the constitutionality of Florida's death statute, its plurality opinion by Justice Stewart assumed that the aggravator would not be found unless part three of *Dixon*'s definition were present to limit and guide the sentencer:

> As a consequence, the [Florida Supreme Court] has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim" . . . [cities omitted] We cannot say that the provision as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt v. Florida, 428 U.S. 242, 255-6, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *see also Lewis*, 110 S.Ct. at 3099 (*Proffitt* approved Florida's heinous aggravator when restricted to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim.")

Although this Court in *Proffitt* indicated *Dixon*'s unnecessarily torturous portion would be a *sine qua non* of heinousness in Florida, the Florida Supreme Court sometimes cites any one or more of *Dixon*'s three parts and sometimes none at all when it defines the circumstance. Some cases cite to the full *Dixon* construction without further elucidation. *See e.g. Lucas v. State*, 376 So.2d 1149, 1153 (Fla. 1979); *see also In re Standard Jury Instructions Criminal Cases—No. 90-1*, 579 So.2d 75 (Fla. 1991) (adopting standard jury instruction similar to *Dixon*'s construction to address problems in light of *Cartwright*). Numerous cases find the aggravator applies because the crime was "evil," "wicked," "atrocious," or some similarly vague term, standing alone. *See e.g. Hargrave v. State*, 366 So.2d 1, 5 (Fla.), *cert. denied*, 444 U.S. 919 (1979) (when defendant shot victim twice in holdup, then waited for store customer to leave and 'executed' victim, crime was extremely wicked and shockingly evil); *Swafford v. State*, 533 So.2d 270 (Fla. 1988), *cert. denied*, 109 S.Ct. 1578 (1989) (upholding aggravator because victim must have felt fear and killing by nine shots, most at extremities, showed "a wanton atrocity."); *Johnson v. State*, 393 So.2d 1069, 1073 (Fla.), *cert. denied*, 454 U.S. 882 (1981) (robbery victim had gun battle with robber, then raised his arms; robber cursed him and shot him to death; murder was "atrocious and cruel and was committed to reek revenge" on victim).

Inasmuch as Florida relies on *Dixon*'s initial list of definitions to limit the circumstance, Florida has placed its foundation on a hill of mud. This Court held juries instructed:

> "[T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others."

are left with an unconstitutional lack of guidance in applying the death penalty. *Shell v. Mississippi*, 111 S.Ct. 313 (1990) (Marshall, J., concurring), *quoting Shell v. State*, 554 So.2d 887, 906-6 (Miss. 1989);[3] *see also Cartwright v. Maynard*, 822 F.2d 1477, 1488 (10th Cir. 1987) (en banc), *aff'd*, 486 U.S. 356 (1988) (holding this identical instruction given to Cartwright's jury insured uncontrolled discretion of that sentencer). The Tenth Circuit set out the problem with the 'definitions' most succinctly: "These terms simply elude objective definition." *Cartwright*, 822 F.2d at 1489. The first part of *Dixon*'s construction alone cannot guide sentencers for the same reason: it makes the aggravator more vague, not less.

The full *Dixon* definition of the heinous aggravator similarly does not limit the facially vague words of the aggravating circumstance by its own terms. It begins with the very words condemned in *Shell* and *Cartwright* as meaningless and applicable to all first degree murders. These words invite an emotional, inflamed response by the sentencer; none could find a defendant guilty of first degree murder and not be moved when told to condemn the man if the crime was "evil." *Dixon's* construction describes conscienceless or pitiless crimes which are unnecessarily torturous *not* as a *limit* to these vague, inflammatory phrases, but merely as a kind of crime "intended to be included" as heinous. *Dixon*, 283 So.2d at 9.

[3] Mississippi derived its vague instruction from the first part of *Dixon*'s construction. *See Wiley v. State*, 484 So.2d 339, 353 (Miss. 1986), *cert. denied*, 479 U.S. 906 (1986).

Adding an example of a heinous offense after a definition which applies to any first degree murder limits Florida's aggravator no better than the examples of heinous crimes on which the Oklahoma courts relied to affirm *Cartwright*. *See Cartwright*, 822 F.2d at 1489-1492; *see also Eddings v. Oklahoma*, 455 U.S. 104, 109 n.4, 102 S.Ct. 869, 71 L.7d.2d 1 (1982) (in reversing *Eddings v. State*, 616 P.2d 1159 (Okla. Ct. Crim. App. 1980) on other grounds, questioned whether the heinous aggravator constitutionally applied where the Oklahoma court had relied on the full *Dixon* construction of the aggravator.).

The Florida Supreme Court recently relied on a similar definition of the circumstance in its new standard instruction. However, this instruction changed the words of *Dixon*—relied on as a limit to the aggravator by this Court in *Proffitt*—from a "conscienceless or pitiless crime which is unnecessarily torturous to the victim," *Dixon*, 283 So.2d at 9; to:

> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

Standard Jury Instructions, 579 So.2d at 75.[4] This change means that a crime which was 'conscienceless,' regardless of whether it was pitiless and torturous, would be especially heinous. Aggravating conscienceless first degree murders violates the teachings of *Cartwright*: a juror could fairly find a "cold-blooded, pitiless crime' in any first degree murder because the phrase is entirely subjective. *See Creech v. Arave*, 928 F.2d 1481, 1492 (9th Cir. 1991). Saying that conscienceless first degree murders are especially heinous turns the circumstance into a catch-all aggravator since that phrase is so subjective, like "coldblooded, pitiless," that anyone commit-

[4] The Florida Supreme Court has historically relied upon the standard jury instructions it promulgates as authority for its holdings in capital cases. *See Pope v. State*, 441 So.2d 1073, 1078 (Fla. 1984); *Campbell v. State*, 571 So.2d 415, 420 (Fla. 1990).

ting first degree murder could fairly be described as conscienceless. One is hard pressed even to imagine a conscionable murder. This construction places complete and unreviewable discretion in the hands of the sentencer, just as did the pre-*Furman* statutes, contrary to the Eighth Amendment.

The facts of *Lucan* show the extreme width of *Dixon's* full construction. In *Lucas*, the defendant shot his ex-wife who ran into her house, and then caught her and shot her to death after a struggle; the Florida Supreme Court held this crime was especially heinous relying on the full Dixon construction. *Lucas*, 376 S.2d at 1153. The facts of *Lucas* are virtually indistinguishable from those in *Cartwright* and *Godfrey*. In *Cartwright*, the defendant whom the victim had let go from his job, confronted and shot the victim's wife at their house after a struggle. He then went to the victim and shot him to death, returned to the victim's wife and tried again to kill her. *Cartwright*, 108 S.Ct. at 1856. In *Godfrey*, the defendant shot and killed his estranged wife through a window of a trailer, came inside, struck his daughter with the gun, and then shot his mother-in-law to death. *Godfrey*, 446 U.S. at 425. This Court ruled the heinousness finding in *Cartwright* and vileness finding in *Godfrey* unconstitutionally expanded those circumstances to virtually any first degree murder. The *Lucas* opinion shows Florida has done the same insofar as the Florida courts rely on the full, vague *Dixon* construction, just as the Mississippi and Oklahoma courts did.

The second portion of *Dixon's* heinousness definition standing alone is also used as a basis for finding the aggravator. The Florida Supreme Court simply cites to *Dixon's* language that refers to the presence of additional acts that set the crime apart from the norm of capital felonies. This part of *Dixon's* construction removes all boundaries on the circumstance since the nature of these "additional acts" is completely undefined and open-ended. In *Harvard v. State*, 414 So.2d 1032 (Fla. 1982), *cert. denied*, 459 U.S. 1128 (1983), the defendant, having

harassed his ex-wife during their separation of several months, followed her from work, pulled next to her car, and killed her instantly with a single shotgun blast to her neck. The Florida court held stalking and harassment "constitute sufficient 'additional acts' to justify application of the heinous, atrocious, or cruel aggravating factor." *Id.* at 1036; *see Phillips v. State*, 476 So.2d 194 (Fla. 1985) (heinousness found when victim stalked by defendant who shot him, chased him and then shot him to death).

At times, the Florida Supreme Court also relies on *Dixon's* unnecessarily torturous language in conjunction with *Dixon's* additional acts definition. In some cases, the Florida Supreme Court has struck the heinous aggravator when the victim died quickly from a gunshot, but still left open the possibility that some unspecified 'additional acts' may make the offense heinous. *See e.g. Burns v. State*, 16 Fla.L.W. S389, S391 (Fla. May 16, 1991). In *Wilson v. State*, 436 So.2d 908, 912 (Fla. 1983), the court similarly struck the aggravator for a victim who had been stabbed once in the chest finding nothing about the crime torturous, conscienceless, or set apart from the norm of capital felonies. In *Breedlove v. State*, 413 So.2d 1 (Fla.), *cert. denied*, 459 U.S. 882 (1982), the Court showed that the "additional acts" are not limited to torturous acts and may be anything at all. Breedlove's victim suffered a single stab wound:

> While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed. This is far different than the norm of capital felonies and sets this crime apart from murder committed in, for example, a street, a store, or other public place.

Id. at 9; *see Troedel v. State*, 462 So.2d 392, 398 (Fla. 1985). *Breedlove* shows that the 'additional acts' language does not require additional torturous acts. Left undefined by *Dixon's* construction and subsequent case-law, this part of *Dixon*—upon which the Court will rely

to affirm cases regardless of any unnecessary suffering—leaves the aggravator completely open-ended, not limited.

Sometimes, the court will apply what could be a limited definition. In *Cheshire v. State*, 568 So.2d 908 (Fla. 1990), the court struck the heinous aggravator when the defendant quickly shot two people to death. The court connected the third part of *Dixon's* construction with the definition of "cruel" in its first part, ignoring the rest:

> The factor of heinous, atrocious or cruel is proper only in torturous murders—those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. *State v. Dixon* . . . .

Id. at 912; *see Shere v. State*, 579 So.2d 86, 95-6 (Fla. 1991); *McKinney v. State*, 579 So.2d 80 (Fla. 1991); *see* also *Porter v. State*, 564 So.2d 1060, 1063 (Fla. 1990), *cert. denied*, 111 S.Ct. 1024 (1991) (striking aggravator because crime not meant to be painful, citing to full *Dixon* construction, but emphasizing last two parts); *Smalley v. State*, 546 So.2d 720 (Fla. 1989) (rejecting constitutional attack on aggravator, citing full *Dixon* construction as its meaning and claiming aggravator limited to "those conscienceless or pitiless crimes which are unnecessarily torturous to the victim."). Despite language in *Smalley* to the contrary, the Florida Supreme Court ruled in *Pope v. State*, 441 So.2d 1073 (Fla. 1984), that defining cruel as "designed to inflict a high degree of pain; *utter indifference to, or enjoyment of, the suffering of others; pitiless.*" positively misleads sentencers on the meaning of the circumstance. *Id.* at 1077. The court noted with approval that the jury was instructed in the bare words of the statute and said "No further definitions of the terms are offered, nor is the defendant's mindset ever at issue." *Id.* at 1078; *see Stano v. State*, 460 So. 2d 890, 893 (Fla.), *cert. denied*, 471 U.S. 1111 (1985) (heinous aggravator goes to nature of the killing, not mindset of perpetrator); *Hitchcock v. State*, 578 So.2d 685, 692 (Fla.), *cert. denied*, 112 S.Ct. 311 (1991) (victim suffering, regardless of the perpetrator's mindset, establishes heinous circumstance).

However, the court will rely on conscienceless/pitiless mental states to qualify a crime as heinous even though no torturous acts occurred. The words of *Dixon* itself indicate a mentally or physically torturous killing has been but a reason to find the aggravator, not a limit on it. *See Vaught v. State*, 410 So.2d 147, 151 (Fla. 1982); *see also Santos v. State*, 16 Fla.L.W. S633, S634 (Fla. September 26, 1991) (factor applies to "torturous murders involving extreme and outrageous depravity. A murder *may* fit this description if it exhibits a desire to inflict . . ." or indifference to suffering.) In *Vaught*, the defendant attempted to rob a gas station with a gun while wearing a mask. The owner exposed the man's face, saying "I know you and I know where you live," and was shot dead. *Vaught*, 410 So.2d at 148. The court approved a heinousness finding because the crime was cold and calculating, rejecting a claim heinousness was limited to cases in which pain or anguish were inflicted. *Id.* at 151; *see also Buenoano v. State*, 527 So.2d 194, 199 (Fla. 1988) (heinousness approved because victim suffering and methodical nature of killing made it conscienceless and pitiless).

Despite this Court's expectation—stated in *Proffitt*—that *Dixon* would be taken to mean that only conscienceless or pitiless crimes which are unnecessarily torturous would be found heinous, the Florida Supreme Court has not so interpreted *Dixon*. In *Pope*, the court ruled the parts of *Dixon* which this Court believed limited the circumstance when it decided *Proffitt* were no longer the law. Numerous definitions, derived from *Dixon*, have been applied to find a crime heinous. Some are completely unlimited; some may be limited, but conflict with other definitions which include differing classes of cases as heinous. In short, Florida, like Mississippi and Oklahoma, has not interpreted *Dixon* in a way which limits the facially vague heinous, atrocious, or cruel circumstance. Moreover, that court has created and applied other construc-

tions of the circumstance even more removed from *Dixon's* language upon which it relies to find crimes are heinous.

2. *The Florida Supreme Court Sometimes Relies on the Manner or Mode of Killing as the Definition of the Aggravating Circumstance in a Way Which Allows Virtually Any First Degree Murder to be Aggravated Thereunder.*

The various permutations of *Dixon*'s language do not exhaust the wide range of choices facing a Florida sentencer peering at the menu of heinousness meanings. As an alternative to reliance on all or part of the *Dixon* construction, at times the Florida Supreme Court relies on the manner of killing as a basis for affirming the heinous aggravator. Under this approach, killings by methods other than shooting almost automatically qualify as heinous (with some limited, arbitrarily applied exceptions); killings by shooting may be found not to be heinous, but no objective limiting principle has been articulated to distinguish those shootings which are heinous from those which are not. The court has held: "The intent and method employed by the wrongdoers is what needs to be examined." *Mills v. State*, 476 So.2d 172, 178 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986). Assuming this categorization has been followed, shootings are the only class of cases in which the aggravator has been struck with any frequency.[5]

[5] Not counting cases in which the opinion is unclear what aggravators were found and not considering those instances in which the jury was instructed on the circumstance but the trial court did not find it, the trial court found the heinous aggravator and imposed death in at least 183 cases between January, 1984 and November 1991. These cases are listed in Appendix A. The Florida Supreme Court struck these findings in 38 of these 183 cases. In all but five of the 38, the victim had been shot to death; since 1973, the Florida Supreme Court has reversed heinousness findings for non-shooting death cases only ten times. *See Rhodes v. State*, 547 So.2d 1201 (Fla. 1989) (strangulation on semi-conscious victim); *Rembert v. State*, 445 So.2d 337, 338 (Fla. 1984) (victim hit on head one or two times); *Scull v. State*, 533 So.2d 1137 (Fla. 1988), *cert. denied*, 490 U.S. 1037 (1989) (one victim killed by a blow to the head); *Bundy v. State*, 471 So.2d 9 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986) (cause and manner of death unknown); *Cherry v. State*, 544 So.2d 184, 188 (Fla. 1989), *cert. denied*, 110 S. Ct. 1835 (1990) (elderly man who died of heart attack during offense); *Herzog v. State*, 439 So.2d 1372, 1379-80 (Fla. 1983) (strangulation of unconscious victim); *Demps v. State*, 395 So.2d 501, 505-6 (Fla.), *cert. denied*, 454 U.S. 933 (1981) (victim stabbed repeatedly); *Wilson v. State*, 436 So.2d 908 (Fla. 1983) (single stab wound to the chest); *Halliwell v. State*, 323 So.2d 557, 561 (Fla. 1975) (victim beaten to death); *Simmons v. State*, 419 So.2d 316 (Fla. 1982) (two blows either of which could have caused instantaneous death).

The Florida Supreme Court routinely finds the heinous aggravator applies to any other method of killing. It usually finds strangulations heinous. *See Hitchcock*, 578 So.2d at 693 (citing cases). The court also routinely finds death by smothering to be heinous. *See Capehart v. State*, 16 Fla. L.W. S447, S449 (Fla. June 13, 1991). Burning another to death has always been found to be especially heinous. *See Henry v. State*, 16 Fla.L.W. S593 (Fla. August 29, 1991); *Nixon v. State*, 572 So.2d 1336 (Fla. 1990); *Way v. State*, 496 So.2d 126 (Fla. 1986). In a case in which the victim was painfully poisoned, the Florida Supreme Court upheld the heinousness finding because the suffering and methodical nature of the killing made it conscienceless and pitiless. *See Buenoano*, 527 So 2d at 199.

Likewise, stabings are almost routinely found heinous. *See Floyd v. State*, 569 So.2d 1225, 1232 (Fla. 1990), *cert. denied*, 111 S.Ct. 2912 (1991) (although one stab wound probably fatal within minutes, multiple stabbing made crime especially heinous); *Trotter v. State*, 576 So.2d 691, 694 (Fla. 1990) (citing cases). Although the Florida court once said a one stab murder was "not such as to make the manner of death unnecessarily torturous or conscienceless and set apart from the norm of capital felonies," *Wilson*, 436 So.2d at 912, that was the only case in which the Florida Supreme Court struck a one-stab murder.[6] That court has twice found crimes espe-

[6] In a single case, without explanation, the court struck a multiple-stab murder. *See Demps*, 395 So.2d at 505-6.

cially heinous when the victim died from a single stab wound. *See Proffitt v. State*, 315 So.2d 461 (Fla. 1975), *aff'd*, 428 U.S. 242 (1976);[7] *Breedlove*, 413 So.2d at 9.

Similarly, beatings are almost always found to be heinous, atrocious, or cruel. *See Penn v. State*, 574 So.2d 1079, 1083 (Fla. 1991) (defendant beat sleeping mother to death with a hammer, causing numerous wounds including 'defensive wounds;' heinousness upheld); *Cherry*, 544 So.2d at 188 (five blows to head area, possibly by a fist, killing elderly victim is especially heinous crime); *Roberts v. State*, 510 So.2d 885 (Fla. 1987), *cert. denied*, 485 U.S. 943 (1988) (citing cases). In *Roberts*, the victim died from an unexpected series of blows to the back of his head. However, since there were defensive wounds to the victim's hands, the court held that sufficed to make the crime especially heinous. *Id.* at 894. The court has said that a single blow killing instantly would not make the crime especially heinous.[8] *See Scull*, 533 So.2d at 1142; *Rembert*, 445 So.2d at 338; *Simmons*, 419 So.2d at 319. However, the number of beating deaths in which death is instantaneous, given the nature of the method, must necessarily be small.

Any notion that the court has limited the heinous factor to those cases in which the method of killing is instantaneous or virtually instantaneous is rebutted by its treatment of killings by gunshot. The court has written "Moreover, the fact that mutiple gunshots wounds were inflicted is not, by itself, sufficient to support a finding of heinous, atrocious, or cruel." *Shere v. State*, 579 So.2d 86, 96 (Fla. 1991); *see Burns v. State*, 16 Fla.L.W. S389, S391 (Fla. May 16, 1991) (citing cases). The court has struck heinousness in a number of shooting cases.

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[7] The fact that Proffitt killed with one stab appears in the Eleventh Circuit's opinion on Proffitt's habeas petition. *See Proffitt v. Wainwright*, 685 F.2d 1227, 1264-6 (11th Cir. 1982), *modified*, 706 F.2d 311, *cert. denied*, 464 U.S. 1002 (1983).

[8] In *Halliwell*, 323 So.2d at 561, however, the court struck the heinousness factor although the defendant beat the victim to death using repeated blows.

Despite this language, even in shooting cases, Florida has not limited the heinous circumstance. Perusing cases in which the court finds the aggravator although there *was* a shooting death demonstrates that virtually any fact may be relied upon by the Florida Supreme Court to find heinousness, thus making it open-ended rather than limited.

Numerous additional facts can make a shooting death an especially heinous offense. Emotional suffering by the victim, including any fear before death, can make a shooting death especially heinous. *See e.g. Farinas v. State*, 569 So.2d 425, 431 (Fla. 1990). The court has said a short period of awareness before death will not suffice to make an offense especially heinous, but cases show that any awareness at all may make a crime especially heinous. *See Ibid.; Huff v. State*, 495 So.2d 145 (Fla. 1986). In *Huff*, the only awareness the victim had that he was to be harmed was the time it took for him to raise his hand after finding his son pointing a gun at him, yet that was sufficient to make the crime especially heinous. *Id.* at 153.

However, the converse is not true. The court has found the crime heinous for shooting a victim completely unaware of danger, apparently because that would be an execution. *See Buford v. State*, 403 So.2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1164 (1982) (shooting a sleeping victim heinous, citing *Spinkellink v. State*, 313 So.2d 666 (Fla. 1975), *cert. denied*, 428 U.S. 911 (1976)). Putting these cases together shows *any shooting crime could* be found heinous because either the victim is aware of the danger and so emotionally strained, making the offense heinous, or unaware of the crime, making the offense heinous as an execution.

Another kind of fact frequently cited which makes a shooting death heinous is the victim's suffering after being shot. The court has sometimes said such suffering is irrelevant to heinousness. *See Teffeteller v. State*, 439 So.2d 840, 846 (Fla. 1983), *cert. denied*, 465 U.S. 1974 (1984); *Mills*, 476 So.2d at 178. More frequently, the

court considers this suffering in deciding whether the crime was especially heinous. *See e.g. Ponticelli v. State*, 16 Fla.L.W. S669 (Fla. October 10, 1991). The court will rely on the victim's experience of pain when the first shot was not fatal, but was then immediately shot to death to hold the crime heinous. *See Squires v. State*, 450 So.2d 208 (Fla.), *cert. denied*, 469 U.S. 892 (1984); *Troedel v. State*, 462 So.2d 392, 398 (Fla. 1984). Thus, killing with any more than one shot will qualify the crime as heinous.

Assuming arguendo that murders by quick shooting without awareness of impending death were a clear, objective principle to distinguish the aggravator, the resulting class of cases to which the aggravator may apply—any murder in which the killing occurred by multiple shots or any other method of killing other than one shot or in which the victim experienced any pain or any awareness of danger or in which the victim was unaware of danger—is an overly wide class. A murder not qualifying to be especially heinous is a rare, perhaps nonexistent, exception; the aggravator is randomly not found in a capricious fashion. A sentencer selecting this item from the heinousness menu has unlimited discretion.

3. *The Suffering of the Victim Has Been Used as a Reason to Find the Heinous Aggravator, but Has Been Read to Qualify Virtually All First Degree Murders as Especially Heinous.*

A Florida sentencer may choose yet another item from the menu to decide if a crime is heinous. Many cases speak of victim suffering as establishing the aggravator. The court states:

> In determining whether the circumstance of heinous, atrocious and cruel applies, the mind set or mental anguish of the victims is an important factor. *Phillips v. State*, 476 So.2d 194 (Fla. 1985).

Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988), *cert. denied*, 489 U.S. 1040 (1989). Since Harvey's burglary

victims became aware of their danger when they heard the perpetrators discuss killing the witnesses and tried to run before being shot, the heinous circumstance applied. *See Hitchcock*, 578 So.2d at 693 (if crime unnecessarily torturous to the victim, regardless of perpetrator's mindset, it is heinous); *Capehart*, 16 Fla.L.W. at S449.

Yet, victim suffering has not limited the circumstance. The Florida Supreme Court explicitly held victim suffering need not be present to find the aggravator in *Vaught*, 410 So.2d at 151. There are a multitude of cases in which the victim suffers no or almost no physical pain and no or only very brief emotional strain, yet Florida courts aggravate the crime as especially heinous. This Court recognizes that utilizing a very short period of fear before a quick death to justify a heinousness finding makes that agravator as wide as the class of first degree murders. In *Godfrey*, this Court found the application of the aggravator to the facts of that case constituted unchannelled discretion; the second killing there occurred after the victim saw her daughter shot to death, after her grandchild was struck by a gun butt, and after the killer broke in to gun the undoubtedly terrified woman down in her house. In *Cartwright*, the victim undoubtedly heard his wife struggle with an intruder, heard her cries as she was shot twice, and faced his ex-employee assailant carrying a weapon in his living room. Although the victim had to have been terrified, this Court found that applying heinousness to his shooting death showed the aggravator was vague.

Florida cases show that victim suffering similarly does not appropriately limit Florida's heinous circumstance. Many of the cases examined above have found a crime heinous even though the victim felt no or a short period of pain and had no or little time to be afraid before death. *See Harvard, supra* ('stalking' ex-wife made crime especially heinous although she was killed instantly without foreknowledge of death by shotgun blast); *Lucas, supra* (defendant shot his ex-wife, caught her as she ran, struggled with her, and then shot her to death); *Vaught*,

supra (defendant shot robbery victim who had torn off defendant's mask); *Huff, supra* (victim turned to see his son pointing a gun at him, raised his hand, and was shot to death); *Johnson, supra* (robbery victim had gunbattle with robber, then raised his arms; robber shot him to death); *see also Christopher v. State*, 407 So.2d 198, 202 (Fla. 1981), *cert. denied*, 456 U.S. 910 (1982) (explained below). A number of other cases are to like effect. In *Spinkellink*, 313 So.2d 666, the defendant shot a sleeping victim to death, yet the finding that the crime was heinous was upheld. *See Buford*, 403 So.2d at 952. In *Gibson v. State*, 351 So.2d 948 (Fla. 1977), *cert. denied*, 435 U.S. 1004 (1978), the defendant started a robbery by telling one victim to get out of his car. As the man got out, asking not to be shot, Gibson shot him twice in the head, killing him. The trial court found the crime heinous solely because Gibson planned the robbery and shot the victim; the appellate court did not disturb this finding. *Id.* at 951 n.5. A parole officer was apparently surprised by the defendant in the office parking lot in *Phillips v. State*, 476 So.2d 194 (Fla. 1985). Phillips shot him twice in the chest; the officer ran a short distance where Phillips shot him repeatedly in the head and back, killing him. The Florida Supreme Court upheld the heinous aggravator solely due to the anguish the victim must have felt as he ran that short distance. *Id.* at 197. In *Ford v. State*, 374 So.2d 496 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980), the defendant shot the victim twice without warning and then, as the victim asked for help, shot and killed him, yet the Florida courts found the crime heinous. *Id.* at 503. To like effect is *Troedel*, 462 So.2d at 398; there a victim survived the first shot to his head before being shot to death. The Florida Supreme Court held this crime was especially heinous because two shots were used and the murder occurred in the victims' home. In *Farinas*, 569 So.2d at 431, the defendant forced his estranged girlfriend into his car. When she jumped out and ran away at an intersection, he shot at her, hitting her spine, then, unjamming his gun, shot her to death. The Florida Supreme Court found the crime especially heinous, supposing

the victim was in fear for her life as she ran and was conscious after the first shot, knowing she would be killed. In none of these cases was the victim's fear prolonged and in none was the physical pain, if any, more than that encountered in virtually any killing, yet the Florida courts found the crimes heinous.

Although the court struck the heinous aggravator in *Herzog*, 439 So.2d at 1379-80 because the victim was not conscious while being strangled, thus suggesting victim awareness is required for the aggravator to be found, in *Jennings v. State*, 453 So.2d 1109 (Fla. 1984), *vacated*, 470 U.S. 1002, *rev'd on other grounds*, 473 So.2d 204 (Fla. 1985), the Florida Supreme Court rejected a contention that heinousness did not apply because the victim may have been unconscious for the entire incident.[9] The court said mental anguish can establish heinousness, but "As important is the totality of the circumstances of the incident and whether they reflect that this was a conscienceless, pitiless, and unnecessarily torturous crime that sets it apart from the norm of capital felonies." *Id.* at 1115. Since the defendant kidnapped, raped, and killed a young girl, the court found this crime qualified. In *Thomas v. State*, 374 So.2d 508 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980), the defendant shot and killed a man during a robbery and then sexually abused the victim's wife. The trial court found the circumstance because of the cruelty to the *wife*, yet the Florida Supreme Court did not upset this finding, apparently relying on the completely open-ended totality of the circumstances. *Id.* at 511 n.1.

Inasmuch as a victim suffering limit is applied, it is subjective, not objective. Almost no murders have abso-

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[9] On the first direct appeal, the court also found the victim had been unconscious during this incident. *Jennings v. State*, 413 So.2d 24 (Fla. 1982). After retrial, the Florida court summarily upheld the heinous aggravator on appeal without addressing the question whether the victim was unconscious or the effect that would have on the aggravation. *Jennings v. State*, 512 So.2d 169 (Fla. 1987).

lutely no fear, as this Court recognized by striking the aggravators in *Godfrey* and *Cartwright* despite short periods of victim terror. Florida has no identifiable, objective rule on how much fear qualifies an offense as heinous. Absent such on objective rule, deciding if a crime is especially heinous because of victim fear becomes completely subjective and arbitrary. Comparing the conflicting results in the cases demonstrates this arbitrariness.

Unchannelled subjectivity appears in decisions where a victim attempts to escape by running or fighting, but then is shot to death. Sometimes the victim's fear makes the crime especially heinous and sometimes not. In *Lewis v. State*, 377 So.2d 640 (Fla. 1978), the defendant shot the victim in the chest and as the victim fled, shot him several times in the back. The court found this crime not heinous. *Id.* at 646; *see also Amoros v. State*, 531 So.2d 1256 (Fla. 1988) (crime not heinous when victim attempted to escape, but trapped at locked door and shot to death). Yet, in *Phillips*, 476 So.2d at 197, the defendant shot the victim twice in the chest, chased him down after a short distance, and then gunned down; this offense was heinous.

Subjectivity appears when a struggle precedes a quick death. In *Brown v. State*, 526 So.2d 903 (Fla.), *cert. denied*, 488 U.S. 944 (1988), the defendant shot a policeman in the arm with the officer's firearm after a struggle. This caused the officer "excruciating pain" in the words of the trial court. The officer begged not to be killed, but the defendant shot him fatally twice more in the head. The Florida Supreme Court struck the heinous circumstance. Yet, in *Grossman v. State*, 525 So.2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989), the defendant struggled with a policewoman after being stopped, hitting her with her flashlight. The officer fired her gun, but the defendant wrestled the weapon away and shot her once, killing her. The Florida courts found this crime especially heinous because the beating was ferocious, and the officer knew she was fighting for her life.

Because almost all murders involve some element of fear, defining heinousness in terms of a victim's emotional suffering, to the extent that it is done, gives the sentencer no meaningful guidance in the absence of some more objective guidelines. *Lewis*, *Phillips*, *Brown*, and *Grossman* show that even the Florida Supreme Court itself cannot find adequate guidance from its cases to reach consistent results. These cases do not provide trial courts with meaningful guidance, but rather leave them on a dark and foggy sea without a lighthouse when trying to discern whether the facts of the case they are deciding are 'especially heinous.'

4. *The Florida Supreme Court Has Eschewed Any Definition of the Heinous Aggravator and Deferred to an Unlimited Exercise of Judgment.*

Most tellingly, the Florida Supreme Court has explicitly abandoned any pretense that it has limited the heinous aggravator by objective, identifiable limits and instead has allowed sentencers to rely on any aspect of the crime to find heinousness. *See Cherry v. State*, 544 So.2d 184, 187 (Fla. 1989), *cert. denied*, 110 S.Ct. 1835 (1990) (citing full *Dixon* definition, but noting "there is no mechanical litmus test" for the aggravator); *Jennings*, 453 So.2d at 1115 (although victim may have been unconscious during entire incident, heinous aggravator upheld; court looks to undefined totality of the circumstances to determine heinousness); *Magill v. State*, 428 So.2d 649 (Fla.), *cert. denied*, 464 U.S. 865 (1983); *Christopher*, 407 So.2d at 202. In *Christopher*, the defendant, while visiting his natural daughter and her adoptive parents, began an affair with her. When the mother learned Christopher planned to leave with his daughter and confronted him, he shot and killed her. The husband came home later and, not realizing anything was wrong, took Christopher to the bank to lend him some money. When they returned home, Christopher knocked him down and then shot him to death. The Florida Supreme Court upheld the heinousness finding, simply saying the trial court could exercise reasoned judgment. *Ibid.*

In *Magill*, the court rejected a contention that it had in 1983 so expanded the heinous aggravator as to make it unconstitutional, but the court's justification shows an aggravator just that expansive.

> It is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, and cruel; rather *it is the entire set of circumstances surrounding the killing* . . .
>
> There can be no mechanical, litmus, test established for determining whether this or any aggravating factor is applicable. Instead, the facts must be considered in light of prior cases addressing the issue and must be compared and contrasted therewith and weighed in light thereof. Then, if the killing and its attendant circumstances do not warrant the finding of heinousness, atrociousness, and cruelty, it will be stricken. Otherwise, assuming that it is warranted in light of earlier cases and that the trial judge used the reasoned judgment which is so necessary, the finding will not be disturbed.

Id. at 651. The Florida Supreme Court does not explain how the trial court can exercise reasoned judgment to sentence a man to die when the only direction given by the statute, as the appellate court interprets it, is to look at all the circumstances of the crime. Relying on all the circumstances of the crime allows the sentencer uncontrolled discretion to impose death based solely on the subjective reactions of the sentencer. As the Tenth Circuit Court of Appeals explained:

> We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was "especially heinous, atrocious, or cruel," but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all the circumstances is not . . . No objective standards limit that discretion.

Cartwright, 822 F.2d at 1491. Such a command directly conflicts with the holdings of *Cartwright*, *Godfrey*, and *Furman* itself.

Furthermore, simply pointing to the case law hardly provides guidance. The only conclusion one could reach in light of the multiple, inconsistent definitions of the circumstances and flatly contradictory results of factually indistinguishable cases is that the Florida courts know a heinous crime when they see one. Such a principle does not provide sentencers with meaningful guidance in imposing death, but rather invites them to condemn a man to be killed based on pure whimsy.

D. Failing to Settle on One or More Definitions of the Circumstance Which Considered Together Limit Its Application Means the Florida Supreme Court's Analysis Has Been Infected by Rather Than Cured the Facial Vagueness of the Statute.

This history of describing Florida's heinous, atrocious, or cruel aggravating circumstance relying on multiple, inconsistent, sometimes unlimited definitions shows there is no objective principle which limits it. In only a very few cases does the appellate court even purport to apply a properly limited definition of the aggravator; no defendant can know if he will be one of the lucky few to have this limitation applied.

This arbitrariness is shown above in discussing some of the inconsistent definitions of the circumstance applied by the Florida Supreme Court. Thus, in *Grossman*, 525 So.2d 833, the Florida courts found the crime especially heinous because a police officer was ferociously beaten as she fought for her life and killed when the defendant wrestled away her weapon and shot her once. Yet, three months after *Grossman* was decided and two weeks before its rehearing was denied, in *Brown*, 526 So.2d 903, heinousness was struck although the defendant struggled with a policeman, shot him in the arm with his firearm, causing "excruciating pain," and ignored the officers' pleas not to be killed, shooting him fatally twice in the head.

This thorny tangle of case law produces many other materially identical fact patterns with dramatically inconsistent results. The most startling inconsistency can

be seen by comparing *Raulerson v. State*, 358 So.2d 826 (Fla.), *cert. denied*, 439 U.S. 959 (1978) with the opinion on the same crime in *Raulerson v. State*, 420 So.2d 567 (Fla. 1982), *cert. denied*, 463 U.S. 1249 (1983). In *Raulerson I*, the defendant shot a policeman to death who had interrupted a felony; the Florida Supreme Court rejected a claim that the victim's instantaneous death meant the crime was not heinous:

> This crime was committed during the course of the robbery and immediately after a rape. There were many shots fired and the deceased was well aware that his life was in danger from the moment he entered the restaurant. This was not a sudden attack, but was part of a general robbery scheme.

Raulerson I, 358 So.2d at 834. In *Raulerson II*, the court held precisely the opposite, citing cases in which it struck heinousness because death was quick. 420 So.2d at 572. Even for the same crime, the court could not come to the same result. In another case, the victim became aware of his impending doom only long enough to raise his hand. *Huff, supra*. Yet, in *Parker v. State*, 458 So.2d 750, 754 (Fla. 1984), *cert. denied*, 470 U.S. 1088 (1985), the victim was taken to an isolated spot by her killers, fell to her knees and covered her face upon seeing the dead body of her boyfriend there. She then was shot. The court found that crime not heinous. In *Breedlove*, 413 So.2d at 9, (final in May, 1982) the court found the crime especially heinous because it occurred in the victim's bed, even though the victim suffered little; yet, in *Simmons v. State*, 419 So.2d 316, 319 (Fla. 1982) (decided in August), the court struck the circumstance since the victim died nearly instantaneously, and saying "The finding that the victim was murdered in his own home offers no support for . . . ." heinousness. When the homicide victim is first a victim of a felony, the court will often focus on victim's terror during the felony to establish heinousness.[10] *See*

[10] Florida law allows the crime to be aggravated if it occurs during the commission of an enumerated felony, above and apart from the heinousness aggravator. § 921.141(5)(d), Fla. Stat. (1989).

e.g., Swafford v. State, 533 So.2d 270 (Fla. 1988), *cert. denied*, 109 S.Ct. 1578 (1989) (citing cases) (victim's kidnap and sexual abuse before killing by multiple shots supported finding of heinousness). However, in *Robinson v. State*, 574 So.2d 108 (Fla. 1991), *cert. denied*, 112 S.Ct. 131 (1991), the defendant had kidnapped a victim, handcuffed her, and he and his companion raped her; heinousness was struck because she was killed by two shots before which her abductors had assured her she would be released after they had had sex. *Id.* at 112. Although in numerous cases, such as *Troedel, supra* and *Ponticelli, supra*, the suffering of a shooting victim after the shooting establishes a heinous circumstance, in *Teffeteller*, 439 So.2d 840, the victim was killed by a single shotgun blast to his abdomen during an attempted robbery "but remained conscious and coherent for about three hours." *Id.* at 842. Yet, "The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm af capital felonies." *Id.* at 846. The court explains, directly contrary to the cases in which it relies on victim suffering to establish heinousness:

> In this case the death instrumentality was a .410 shotgun fired at close range. Whether death is immediate or whether the victim lingers and suffers is pure fortuity. The intent and method employed by the wrongdoers is what needs to be examined.

Mills, 476 So.2d at 178.

The Florida Supreme Court's own inability to apply its case law in a consistent manner dramatically shows that the sentencer, even if presumed to know this case law, cannot gain meaningful guidance from it. These inconsistencies are explainable, but only because the Florida Supreme Court maintains numerous varying definitions of heinousness. The Florida Supreme Court often could choose not to find a crime heinous, dependent on which of the numerous varying definitions it will rely, but in-

stead may choose another denition which may itself be limited but includes the kind of case in question as heinous. Some choices allow the sentencer to apply the heinous circumstance to any first degree murder. The cases, considered together, as in fairness they must be since the sentencer must look to all of them, show no clear, objective limit on the vague words of Florida's heinous aggravator exists. Absent such a limit, this portion of Florida's statute must be struck as unconstitutional.

CONCLUSION

For the foregoing reasons, the Volunteer Lawyers' Resource Center respectfully urges this Court to reverse the decision of the Florida Supreme Court and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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January 2, 1992

APPENDIX

APPENDIX

POST-1983 FLORIDA CASES IN WHICH THE TRIAL COURT FOUND HEINOUSNESS, BY YEAR

——1984——

Pope v. State, 441 So.2d 1073 (Fla. 1984).

Bottoson v. State, 443 So.2d 962 (Fla.), *cert. denied*, 469 U.S. 872 (1984).

Maxwell v. State, 443 So.2d 967 (Fla. 1984).

Clark v. State, 443 So.2d 973 (Fla.), *cert. denied*, 467 U.S. 1210 (1984).

Sims v. State, 444 So.2d 922 (Fla.), *cert. denied*, 467 U.S. 1246 (1984).

Preston v. State, 444 So.2d 939 (Fla. 1984).

Rambert v. State, 445 So.2d 337 (Fla. 1984).

Oats v. State, 446 So.2d 90 (Fla. 1984).

Lusk v. State, 446 So.2d 1038 (Fla.), *cert. denied*, 469 U.S. 873 (1984).

Heiney v. State, 447 So.2d 210 (Fla.), *cert. denied*, 469 U.S. 920 (1984).

Bassett v. State, 449 So.2d 803 (Fla. 1984).

Squires v. State, 450 So.2d 208 (Fla.), *cert. denied*, 469 U.S. 892 (1984).

Jackson v. State, 451 So.2d 458 (Fla. 1984).

Blanco v. State, 452 So.2d 520 (Fla. 1984), *cert. denied*, U.S. 1181 (1985).

Card v. State, 453 So.2d 17 (Fla.), *cert. denied*, 469 U.S. 989 (1984).

Mann v. State, 453 So.2d 784 (Fla. 1984), *cert. denied*, 469 U.S. 1181 (1985).

James v. State, 453 So.2d 786 (Fla. 1984), *cert. denied*, 469 U.S. 1098 (1985).

Jennings v. State, 453 So.2d 1109 (Fla. 1984), vacated, 470 U.S. 1002, *rev'd on other grounds*, 473 So.2d 204 (Fla. 1985).

Gorham v. State, 454 So.2d 556 (Fla. 1984), *cert. denied*, 469 U.S. 1181 (1985).

Bundy v. State, 455 So.2d 330 (Fla. 1984), *cert. denied*, 476 U.S. 1109 (1986).

Kennedy v. State, 455 So.2d 351 (Fla. (1984), *cert. denied*, 469 U.S. 1197 (1985).

Thomas v. State, 456 So.2d 454 (Fla. 1984).

Lemon v. State, 456 So.2d 885 (Fla. 1984), *cert. denied*, 469 U.S. 1230 (1985).

Groover v. State, 458 So.2d 226 (Fla. 1984), *cert. denied*, 471 U.S. 1009 (1985).

Parker v. State, 458 So.2d 750 (Fla. 1984), *cert. denied*, 470 U.S. 1088 (1985).

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Doyle v. State, 460 So.2d 353 (Fla. 1985).

Stano v. State, 460 So.2d 890 (Fla.), *cert. denied*, 471 U.S. 1111 (1985).

Davis v. State, 461 So.2d 67 (Fla., *cert. denied*, 473 U.S. 913 (1985).

Troedel v. State, 462 So.2d 392 (Fla. 1985).

Duest v. State, 462 So.2d 446 (Fla. 1985).

Mills v. State, 462 So.2d 1075 (Fla.), *cert. denied*, 473 U.S. 911 (1985).

Randolph v. State, 463 So.2d 186 (Fla.), *cert. denied*, 473 U.S. 907 (1985).

Henderson v. State, 463 So.2d 196 (Fla., *cert. denied*, 473 U.S. 916 (1985).

Bates v. State, 465 So.2d 490 (Fla. 1985), *after remand*, 506 So.2d 1033, *cert. denied*, 108 S.Ct. 212 (1987).

Johnson v. State, 465 So.2d 499 (Fla.), *cert. denied*, 474 U.S. 865 (1985).

Medina v. State, 466 So.2d 1046 (Fla. 1985).

Barclay v. State, 470 So.2d 691 (Fla. 1985).

Bundy v. State, 471 So.2d 9 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986).

Francis v. State, 473 So.2d 672 (Fla.), *cert. denied*, 474 U.S. 1094 (1985).

Brown v. State, 473 So.2d 1260 (Fla.), *cert. denied*, 474 U.S. 1038 (1985).

Wright v. State, 473 So.2d 1277 (Fla.), *cert. denied*, 474 U.S. 1094 (1985).

Valle v. State, 474 So.2d 796 (Fla. 1985), *vacated*, 476 U.S. 1102 (1986), *rev'd on other grounds*, 502 So.2d 1225 (Fla. 1987), *after remand*, 581 So.2d 40 (Fla.), *cert. denied*, 60 U.S.L.W. 3404 (U.S. December 2, 1991) (No. 91-5974).

Ross v. State, 474 So.2d 1170 (Fla. 1985).

Hoffman v. State, 474 So.2d 1178 (Fla. 1985).

Gore v. State, 475 So.2d 1205 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986).

Roman v. State, 475 So.2d 1228 (Fla. 1985), *cert. denied*, 475 U.S. 1090 (1986).

Bertolotti v. State, 476 So.2d 130 (Fla. 1985).

Parker v. State, 476 So.2d 134 (Fla. 1985).

Mills v. State, 476 So.2d 172 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986).

Cave v. State, 476 So.2d 180 (Fla. 1985), *cert. denied*, 476 U.S. 1178 (1986).

Phillips v. State, 476 So.2d (194 Fla. 1985).

Hooper v. State, 476 So.2d 1253 (Fla. 1985), *cert. denied*, 475 U.S. 1098 (1986).

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Deaton v. State, 480 So.2d 1279 (Fla. 1986).

Byrd v. State, 481 So.2d 468 (Fla.), *cert. denied*, 476 U.S. 1153 (1986).

Amazon v. State, 487 So.2d 8 (Fla.), *cert. denied*, 479 U.S. 914 (1986).

Marek v. State, 492 So.2d 1055 (Fla. 1986).

Cooper v. State, 492 So.2d 1059 (Fla. 1986), *cert. denied*, 479 U.S. 1101 (1987).

Kokal v. State, 492 So.2d 1317 (Fla. 1986).

Wilson v. State, 493 So.2d 1019 (Fla. 1986).

Muhammad v. State, 494 So.2d 969 (Fla. 1986), *cert. denied*, 479 U.S. 1101 (1987).

Scott v. State, 494 So.2d 1134 (Fla. 1986).

Lambrix v. State, 494 So.2d 1143 (Fla. 1986).

Huff v. State, 495 So.2d 145 (Fla. 1986).

Way v. State, 496 So.2d 126 (Fla. 1986), *sentence vacated on other grounds*, 568 So.2d 1263 (Fla. 1990).

Irizarry v. State, 496 So.2d 822 (Fla. 1986).

Johnston v. State, 497 So.2d 863 (Fla. 1986).

Atkins v. State, 497 So.2d 1200 (Fla. 1986).

Floyd v. State, 497 So.2d 1211 (Fla. 1986), *after remand*, 569 So.2d 1225 (Fla. 1990), *cert. denied*, 111 S.Ct. 2912 (1991).

Jackson v. State, 498 So.2d 906 (Fla. 1986).

Melendez v. State, 498 So.2d 1258 (Fla. 1986).

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Jackson v. State, 502 So.2d 409 (Fla.), *cert. denied*, 482 U.S. 920 (1987).

Tompkins v. State, 502 So.2d 415 (Fla.), *cert. denied*, 483 U.S. 1033 (1987).

Wasko v. State, 505 So.2d 1314 (Fla. 1987).

Bates v. State, 506 So.2d 1033 (Fla.), *cert. denied*, 484 U.S. 872, 873 (1987).

Ferry v. State, 507 So.2d 1373 (Fla. 1987).

Niebert v. State, 508 So.2d 1 (Fla. 1987).

Hansbrough v. State, 509 So.2d 1081 (Fla. 1987).

Craig v. State, 510 So.2d 857 (Fla.), *cert. denied*, 484 U.S. 1020 (1987).

Engle v. State, 510 So.2d 881 (Fla. 1987), *cert. denied*, 485 U.S. 924 (1988).

Roberts v. State, 510 So.2d 885 (Fla. 1987), *cert. denied*, 485 U.S. 943 (1988).

Jennings v. State, 512 So.2d 169 (Fla. 1987), *cert. denied*, 484 U.S. 1079 (1988).

Kight v. State, 512 So.2d 922 (Fla. 1987), *cert. denied*, 485 U.S. 929 (1988).

Koon v. State, 513 So.2d 1253 (Fla. 1987).

Patterson v. State, 513 So.2d 1257 (Fla. 1987).

King v. State, 514 So.2d 354 (Fla. 1987), *cert. denied*, 487 U.S. 1241 (1988).

Smith v. State, 515 So.2d 182 (Fla. 1987), *cert. denied*, 485 U.S. 971 (1988).

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Dubois v. State, 520 So.2d 260 (Fla. 1988).

Hardwick v. State, 521 So.2d 1071 (Fla., *cert. denied*, 488 U.S. 871 (1988).

Holsworth v. State, 522 So.2d 348 (Fla. 1988).

Jackson v. State, 522 So.2d 802 (Fla.), *cert. denied*, 488 U.S. 871 (1988).

Perry v. State, 522 So.2d 817 (Fla. 1988).

Correll v. State, 523 So.2d 562 (Fla.), *cert. denied*, 488 U.S. 871 (1988).

Lloyd v. State, 524 So.2d 396 (Fla. 1988).

Grossman v. State, 525 So.2d 833 (Fla.), *cert. denied*, 489 U.S. 1071 (1989).

Brown v. State, 526 So.2d 903 (Fla.), *cert. denied*, 488 U.S. 944 (1988).

Mitchell v. State, 527 So.2d 179 (Fla), *cert. denied*, 488 U.S. 960 (1988).

Buenoano v. State, 527 So.2d 194 (Fla. 1988).

Garron v. State, 528 So.2d 353 (Fla. 1988).

Long v. State, 529 So.2d 286 (Fla. 1988).

Harvey v. State, 529 So.2d 1083 (Fla. 1988), *cert. denied*, 489 U.S. 1040 (1989).

Turner v. State, 530 So.2d 45 (Fla. 1988), *cert. denied*, 489 U.S. 1040 (1989).

Jackson v. State, 530 So.2d 269 (Fla.), *cert. denied*, 488 U.S. 1051 (1988).

Hildwin v. State, 531 So.2d 124 (Fla. 1988), aff'd, 490 U.S. 639 (1989).

Amoros v. State, 531 So.2d 1256 (Fla. 1988).

Lamb v. State, 532 So.2d 1051 (Fla. 1988).

Swafford v. State, 533 So.2d 270 (Fla. 1988), *cert. denied*, 109 S.Ct. 1578 (1989).

Bryan v. State, 533 So.2d 744 (Fla. 1988), *cert. denied*, 490 U.S. 1028 (1989).

Scull v. State, 533 So.2d 1137 (Fla. 1988), *cert. denied*, 490 U.S. 1037 (1988).

Chandler v. State, 534 So.2d 701 (Fla. 1988), *cert. denied*, 490 U.S. 1076 (1989).

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Schafer v. State, 537 So.2d 988 (Fla. 1989).

Ramirez v. State, 542 So.2d 342 (Fla. 1989).

Cook v. State, 542 So.2d 964 (Fla. 1989), *after remand*, 581 So.2d 141 (Fla. 1991).

Cherry v. State, 544 So.2d 184 (Fla. 1989), *cert. denied*, 110 S.Ct. 1835 (1990).

Rutherford v. State, 545 So.2d 843 (Fla. 1989).

Mendyk v. State, 545 So.2d 846 (Fla.), *cert. denied*, 110 S.Ct. 520 (1989).

Dudley v. State, 545 So.2d 857 (Fla. 1989).

Pentecost v. State, 545 So.2d 861 (Fla. 1989).

Rivera v. State, 545 So.2d 864 (Fla. 1989).

Smalley v. State, 546 So.2d 720 (Fla. 1989).

Castro v. State, 547 So.2d 111 (Fla. 1989).

Freeman v. State, 547 So.2d 125 (Fla. 1989).

Walton v. State, 547 So.2d 622 (Fla.), *cert. denied*, 110 S.Ct. 759 (1989).

Hamilton v. State, 547 So.2d 630 (Fla. 1989).

Cochran v. State, 547 So.2d 928 (Fla. 1989).

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Thompson v. State, 553 So.2d 153 (Fla. 1989), *cert. denied*, 110 S.Ct. 2194 (1990).

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Morris v. State, 557 So.2d 27 (Fla. 1990).

Reed v. State, 560 So.2d 203 (Fla.), *cert. denied*, 111 S.Ct. 230 (1990).

Hallman v. State, 560 So.2d 223 (Fla. 1990).

Rivera v. State, 561 So.2d 536 (Fla. 1990).

Blakely v. State, 561 So.2d 560 (Fla. 1990).

Randolph v. State, 562 So.2d 331 (Fla.), *cert. denied*, 111 S.Ct. 538 (1990).

Porter v. State, 564 So.2d 1060 (Fla. 1990), *cert. denied*, 111 S.Ct. 1024 (1991).

Hall v. State, 568 So.2d 882 (Fla. 1990).

Duckett v. State, 568 So.2d 891 (Fla. 1990).

Chesire v. State, 568 So.2d 908 (Fla. 1990).

Farinas v. State, 569 So.2d 425 (Fla. 1990).

Floyd v. State, 569 So.2d 1225 (Fla. 1990), *cert. denied*, 111 S.Ct. 2912 (1991).

Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990), *cert. denied*, 111 S.Ct. 2045 (1991).

Buford v. State, 570 So.2d 923 (Fla. 1990).

Colina v. State, 570 So.2d 929 (Fla. 1990).

Campbell v. State, 571 So.2d 929 (Fla. 1990).

Campbell v. State, 571 So.2d 415 (Fla. 1990).

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Lewis v. State, 572 So.2d 908 (Fla.), *cert. denied*, 111 S. Ct. 2914 (1991).

Nixon v. State, 572 So.2d 1336 (Fla. 1991).

Holton v. State, 573 So.2d 284 (Fla.), *cert. denied*, 111 S.Ct. 2275 (1991).

Bruno v. State, 574 So.2d 76 (Fla.), *cert. denied*, 112 S. Ct. 112 (1991).

Robinson v. State, 574 So.2d 108 (Fla.), *cert. denied*, 112 S.Ct. 131 (1991).

Williams v. State, 574 So.2d 136 (Fla. 1991).

Nibert v. State, 574 So.2d 1059 (Fla. 1991).

Penn v. State, 574 So.2d 1079 (Fla. 1991).

Downs v. State, 574 So.2d 1095 (Fla. 1991).

Douglas v. State, 575 So.2d 165 (Fla. 1991).

Hegwood v. State, 575 So.2d 170 (Fla. 1991).

Trotter v. State, 576 So.2d 691 (Fla. 1991).

Hitchcock v. State, 578 So.2d 685 (Fla.), *cert. denied*, 112 S.Ct. 311 (1991).

McKinney v. State, 579 So.2d 80 (Fla. 1991).

Shere v. State, 579 So.2d 86 (Fla. 1991).

Zeigler v. State, 580 So.2d 127 (Fla), *cert. denied*, 112 S.Ct. 390 (1991).

Sochor v. State, 580 So.2d 595 (Fla), *cert. granted*, 60 U.S.L.W. 3374 (U.S. November 14, 1991) (No. 91-5843).

Derrick v. State, 581 So.2d 31 (Fla. 1991).

Scott v. State, 581 So.2d 887 (Fla. 1991).

Gilliam v. State, 582 So.2d 610 (Fla. 1991).

McCrae v. State, 582 So.2d 613 (Fla. 1991).

Burns v. State, 16 Fla.L.W. S389 (Fla. May 16, 1991).

Christophoēr v. State, 16 Fla.L.W. S410 (Fla. May 30, 1991).

Green v. State, 16 Fla.L.W. S437 (Fla. June 6, 1991).

Capehart v. State, 16 Fla.L.W. S447 (Fla. June 13, 1991).

Taylor v. State, 16 Fla.L.W. S469 (Fla. June 27, 1991).

Espinosa v. State, 16 Fla.L.W. S489 (Fla. July 11, 1991).

Beltran-Lopez v. State, 16 Fla.L.W. S492 (Fla. July 11, 1991).

Henry v. State, 16 Fla.L.W. S593 (Fla. August 29, 1991).

Wright v. State, 16 Fla. L.W. S595 (Fla. August 29, 1991).

MaQueira v. State, 16 Fla.L.W. S599 (Fla. August 29 1991).

Davis v. State, 16 Fla.L.W. S602 (Fla. September 5, 1991).

Craig v. State, 16 Fla.L.W. S604 (Fla. September 5, 1991).

Bowden v. State, 16 Fla.L.W. S614 (Fla. September 2, 1991).

Sireci v. State, 16 Fla.L.W. S623 (Fla. September 19, 1991).

Santos v. State, 16 Fla.L.W. S633 (Fla. September 26, 1991).

Bedford v. State, 16 Fla.L.W. S665 (Fla. October 10, 1991).

Ponticelli v. State, 16 Fla.L.W. S669 (Fla. October 10, 1991).

Tillman v. State, 16 Fla.L.W. S674 (Fla. October 17, 1991).